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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 171

FIRST NATIONAL BANK OF BOSTON, EXECUTOR OF THE ESTATE OF EDWARD H. HASKELL, DECEASED, APPELLANT,

vs.

STATE OF MAINE

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

FILED JUNE 20, 1931.

(35,985)

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INDEX

	Original	Print
Proceedings in supreme judicial court of Maine	1	1
Caption (omitted in printing)	1	
Record from superior court of Cumberland County	2	1
Writ of attachment	2	1
Plea	5	3
Agreed statement of facts	7	5
Opinion, Farrington, J.	13	11
Mandate	25	22
Petition for appeal, assignments of error, and prayer for reversal	27	23
Order allowing appeal	30	26
Bond on appeal (omitted in printing)	32	
Citation and service (omitted in printing)	34	
Stipulation for transcript of record	35	27
Clerk's certificate (omitted in printing)	37	
Statement of points to be relied upon and stipulation to print entire record	38	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 27, 1931

[fol. 1] [Caption omitted]

[fol. 2]

IN SUPERIOR COURT OF CUMBERLAND COUNTY

WRIT

[L. S.]

STATE OF MAINE,
Cumberland, ss:

To the Sheriffs of our several counties or either of their deputies, Greeting:

We command you to attach the goods and estate which were of Edward H. Haskell, late of Newton in the Commonwealth of Massachusetts, deceased, in the custody of the First National Bank of Boston, a corporation incorporated under the laws of the United States and located at Boston in the Commonwealth of Massachusetts, as executor of said Haskell's Will, which has been duly admitted to Probate in the Probate Court of Androscoggin County, Maine, as a foreign will, said corporation having appointed and qualified in said court as Executor thereunder, in ancillary proceedings—to the value of forty thousand dollars; and summon the said Defendant in its capacity as Executor aforesaid, (if it may be found in your precinct) to appear before our Justice of our Superior Court, to be held at Portland, within and for said County of Cumberland, on the first Tuesday of May A. D. 1930, then and there in our said Court to answer unto the State of Maine, which brings this action by Clement F. Robinson, of said Portland, in his capacity as Attorney-General, by virtue of Chapter 69, section 11, of the Revised Statutes of 1916.

In a plea of debt for that the State of Maine, by Clement F. Robinson, its Attorney-General, on the 19th day of February, 1930, by decree of Hon. Benjamin L. Berman, Judge of Probate for the County of Androscoggin, by the consideration of said Judge, recovered judgment against the defendant in the sum of $30,139.08, as appears by the following copy of said decree:

"State of Maine,
"Androscoggin, ss.

Probate Court

[fol. 3] Amended Decree

Estate of Edward H. Haskell

"Whereas, the executors of the Will of the late Edward H. Haskell have appealed from the decree of this Court assessing a gross inheritance tax of sixty-two thousand three hundred thirty dollars and forty-one cents ($62,330.41), and

"Whereas, said appeal was pending before the Law Court for decision and determination, and

"Whereas, the State of Maine, represented by Clement F. Robinson, its Attorney-General, and the executors represented by Franklin Fisher, have arrived at the following agreement, namely: that said executors be allowed a credit of thirty-two thousand one hundred ninety dollars and fifty-three cents ($32,190.53) being the amount of inheritance taxes paid by these executors to the Commonwealth of Massachusetts.

"It is, therefore, ordered, adjudged, and decreed, that the gross tax, as computed by the Court in its original decree determining said inheritance tax to be sixty-two thousand three hundred thirty dollars and forty-one cents ($62,330.41) be and is hereby reduced by granting to the estate of Edward H. Haskell credit for inheritance tax paid to the Commonwealth of Massachusetts amounting to thirty-two thousand one hundred ninety dollars and fifty-three cents ($32,190.53) leaving a balance of inheritance taxes assessed by the State of Maine of thirty thousand, one hundred thirty nine dollars and eighty-eight cents ($30,139.88).

"B. L. Berman, Judge.

"February 19th, 1930."

This judgment, as by the record thereof remaining appears, is in full force, and not reversed, annulled, or satisfied; whereby an action has accrued to the plaintiff to have and recover of the defendant the aforesaid sum of $30,139.88, and interest thereon in accordance with law;

[fol. 4] Yet the said Defendant, though requested, has not paid the same, but neglects so to do; To the damage of the said State; as the Attorney General says, the sum of $40,

000, which shall then and there be made to appear, with other due damages. And have you there this Writ, with your doings therein.

Witness, Arthur Chapman, Esq., Justice of said Superior Court, at Portland aforesaid, the eighteenth day of April in the year of our Lord one thousand nine hundred and thirty.

Linwood F. Crockett, Clerk.

STATE OF MAINE,
Cumberland, ss:

April 21, 1930.

Due and sufficient service of the within writ is hereby acknowledged, and the Clerk of Courts for Cumberland County is hereby requested to enter my appearance, generally, in the within proceeding, for the Estate of Edward H. Haskell, and the First National Bank of Boston as executor thereof.

Franklin Fisher, Leonard A. Pierce.

A true copy of writ. Attest:
Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur., Maine.) (Seal Superior Court, State of Maine.)

[fol. 5] IN SUPERIOR COURT OF CUMBERLAND COUNTY, MAY TERM, 1930

STATE OF MAINE

vs.

FIRST NAT'L BANK OF BOSTON

PLEA

And the said Defendant comes and defends, &c., when, &c., and says that he is not indebted in manner and form as the Plaintiff in his writ has declared against him and of this puts himself upon the country.

Franklin Fisher, Defendant's Attorney, by Cook, Hutchinson, Pierce & Connell.

And the Plaintiff likewise.

By Clement F. Robinson, Atty. Gen'l., Plaintiff's Attorney.

And for a brief statement of special matter of defense to be used under the general issue pleaded, the said Defendant further says:

"The inheritance tax provided for by Chapter 69 of the Revised Statutes of Maine and additions thereto and amendments thereof is an excise or duty upon the right or privilege of taking property by will or descent under the law of the State of Maine and is assessed on transfers from the dead to the living in those cases where it is by virtue of the laws of the State of Maine that the right or privilege of taking by will or descent at all exists."

"The transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell and transferred by his will is not so transferred as right or privilege of taking by will or descent by virtue of the laws of the State of Maine and it is not by virtue of the laws of this State that the right or privilege of such transfer to the Legatees at all exists. The assessment of an inheritance tax on the transfer of stock in the Great Northern Paper Company owned by Edward H. Haskell is wholly beyond the power of the State of Maine and an attempt to tax something not within the jurisdiction of the State of Maine contrary to the provisions of [fol. 6] the Fourteenth Article of the Articles in Addition to and in Amendment of the Constitution of the United States of America."

"An assessment of an inheritance tax by the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty cents ($32,190.50) was paid by the excutors of Edward H. Haskell. As Edward H. Haskell was domiciled in Massachusetts, the situs of his stock in the Great Northern Paper Company for inheritance tax purposes was in Massachusetts. An inheritance tax on the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is beyond the jurisdiction of the State of Maine and constitutes double taxation of intangible property contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America."

"The benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is so small compared with the tax claimed by the State of Maine that it clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation,—to spoliation under the guise of exerting the taxing power contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America."

First National Bank of Boston, Exr., by —— ——, by —— ——, Attorneys for the Defendant.

A true copy of Plea. Attest:
Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur., Maine). (Seal Superior Court, State of Maine.)

[fol. 7] IN SUPERIOR COURT OF CUMBERLAND COUNTY, MAY TERM, 1930

STATE OF MAINE, by CLEMENT F. ROBINSON, Attorney General,

v.

FIRST NATIONAL BANK OF BOSTON, Administrator of the Estate of Edward H. Haskell

Agreed Statement of Facts

The parties to this action were before the Law Court at the December Term 1929 on the following agreed statement of facts, reported from the Supreme Court of Probate for Androscoggin County, which facts the parties in the present case stipulate to be true.

"Stipulation"

"1. Edward H. Haskell died testate a resident of Massachusetts, January 8, 1924.

"2. The largest part of the property of Edward H. Haskell consisted of stock in the Great Northern Paper Company, a Main corporation.

"3. The will of Edward H. Haskell was probated in the county of Middlesex in the Commonwealth of Massachusetts, and was there legally subject to an inheritance tax of like character to the inheritance tax of the State of Maine on his stock in the Great Northern Paper Company. A tax of $32,190.53 was legally paid to the Commonwealth of Massachusetts on legacies and distributive shares made up in greater part of the proceeds of said stock.

"4. Ancillary administration was taken out in Androscoggin County State of Maine, and an inheritance tax of $62,350.41 was assessed by the Probate Court of Androscoggin County, on the property passing by the will.

"5. An appeal was taken by the executor from the assessment of the inheritance tax by the Probate Court of Andro- [fol. 8] scoggin County, on the ground that the assessment was unconstitutional, and in violation of Article 4 Section 2 of the Constitution of the United States of America and Article 14 of the Amendments to the Constitution in that the provisions of chapter 69, section 4 of the Revised Statutes of Maine were not applied in assessing said inheritance tax because Edward H. Haskell was not a resident of the State of Maine.

"6. The sole question before the court is the unconstitutionality of Chapter 69, section 4 of the Revised Statutes of Maine. If said section is constitutional, the decree shall be:

"'Appeal dismissed; decree below affirmed.'

"If said section is unconstitutional; the decree shall be:

"'Appeal sustained. Proceedings remanded to court below with instructions to give the estate of Edward H. Haskell the same benefits, privileges and immunities that are granted to estates of residents of Maine by chapter 69, section 4 of the Revised Statutes of Maine.'"

"Dated September 23, 1929.

"Franklin Fisher, Attorney for Estate of Edward H. Haskell, Clement F. Robinson, Attorney General, for the State of Maine.

"The questions of law in this case are of sufficient doubt and importance to justify reporting it to the Law Court, which is hereby done, the parties consenting, for decision, on the foregoing agreed statement of facts.

"Charles J. Dunn, Justice Presiding."

Thereafter while the case was in the Law Court the parties made the following agreement:

First. That the following decree be entered in the Probate Court of Androscoggin County:

[fol. 9] "STATE OF MAINE,
"Androscoggin:

PROBATE COURT

"Amended Decree

"Whereas, the executors of the will of the late Edward H. Haskell have appealed from the decree of this court assessing a gross inheritance tax of sixty two thousand three hundred and thirty dollars and forty one cents ($62,330.41) and,

"Whereas said appeal was pending before the Law Court for decision and determination, and

"Whereas, the State of Maine, represented by Clement F. Robinson, its Attorney General, and the executors represented by Franklin Fisher, have arrived at the following agreement, namely: that said executors be allowed a credit of thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) being the amount of the inheritance taxes paid by these executors to the Commonwealth of Massachusetts.

"It is therefore ordered, adjudged, and decreed that the gross tax as computed by the court in its original decree determining said inheritance tax to be sixty two thousand three hundred and thirty dollars and forty one cents ($62,330.41) be and hereby is reduced by granting to the Estate of Edward H. Haskell credit for inheritance tax paid to the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifth three cents ($32,190.53) leaving a balance of inheritance taxes assessed by the State of Maine of thirty thousand,

one hundred and thirty nine dollars and eighty eight cents ($30,139.88).

"February 19th, 1930.

"B. L. Berman, Judge."

Second. That the Attorney General under the statute would bring an action of Debt for the collection of the amount of tax decreed in the amended Decree of the Judge of the Probate Court of Androscoggin County.

[fol. 10] Third. That the executors of the will of Edward H. Haskell would avail themselves of any defense possible in said action of debt.

Fourth. That an entry should be entered in the Law Court,—"Appeal Dismissed. Settled below."

In accordance with this agreement the decree above quoted was duly entered on February 19, 1930, and has not been appealed from, modified, reversed, annulled or satisfied.

Thereafter the Attorney General brought the present action for Debt by writ dated April 19 returnable at the May Term A. D. 1930 of the Superior Court held in Cumberland County against the executors of Edward H. Haskell. The declaration reads as follows:

"In a plea of debt for that the State of Maine, by Clement F. Robinson, its Attorney General, on the 19th day of February, 1930, by decree of the Hon. Benjamin L. Berman, Judge of Probate for the County of Androscoggin, by the consideration of said Judge, recovered judgment against the defendant in the sum of $30,139.08, as appears by the following copy of said decree.

(At this point is inserted a copy of decree given above.)

"This judgment, as by the record thereof remaining appears, is in full force, and not reversed, annulled, or satisfied; whereby an action has accrued to the plainitff to have and recover of the defendant the aforesaid sum of $30,139.88, and interest thereon in accordance with law."

Service of the writ was accepted by Franklin Fisher and Leonard A. Pierce for the defendant The First National Bank of Boston; the writ was entered and is pend-

ing in court, and the attorneys have each entered a general appearance for the defendant.

A plea of the general issue and a brief statement reading as follows was entered by the Defendant's attorneys:

"The inheritance tax provided for by Chapter 69 of [fol. 11] the Revised Statutes of Maine and additions thereto and amendments thereof is an excise or duty upon the right or privilege of taking property by will or descent under the law of the State of Maine and is assessed on transfers from the dead to the living in those cases where it is by virtue of the laws of the State of Maine that the right or privilege of taking by will or descent at all exists.

"The transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell and transferred by his will is not so transferred as right or privilege of taking by will or descent by virtue of the laws of the State of Maine and it is not by virtue of the laws of this State that the right or privilege of such transfer to the Legatees at all exists. The assessment of an inheritance tax on the transfer of stock in the Great Northern Paper Company owned by Edward H. Haskell is wholly beyond the power of the State of Maine and an attempt to tax something not within the jurisdiction of the State of Maine contrary to the provisions of the Fourteenth Article of the Articles in Addition to and in Amendment of the Constitution of the United States of America.

"An assessment of an inheritance tax by the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) was paid by the executors of Edward H. Haskell. As Edward H. Haskell was domiciled in Massachusetts, the situs of his stock in the Great Northern Paper Company for inheritance tax purposes was in Massachusetts. An inheritance tax on the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is beyond the jurisdiction of the State of Maine and constitutes double taxation of intangible property contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America.

"The benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is so

small compared with the tax claimed by the State of Maine that it clearly results in such flagrant and palpable in- [fol. 12] equality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, to spoliation under the guise of exerting the taxing power contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America."

It is further agreed that substantially all of the Great Northern Paper Company's property, including its real estate and mills, are located within the borders of the State of Maine, and that as appears of record in the Androscoggin Probate Court in these proceedings all the property of the Defendant's testator with respect to which the decree sued on was based was shares of stock in the Great Northern Paper Company.

The case is submitted by the parties on the facts and pleadings stated above for the determination of the court as to the liability of the defendant for the sum sued for; judgment to be entered for the plaintiff or defendant as the court may find proper.

First National Bank of Boston, Exr., by Franklin Fisher, Leonard A. Pierce. State of Maine, by Clement F. Robinson, Attorney General.

The questions of law in this case are of sufficient doubt and importance to justify reporting it to the Law Court, which is hereby done, the parties consenting, for decision on the foregoing agreed statement of facts.

Dated May 23rd, 1930.

Harry Manser, Justice Presiding.

A true copy of Agreed Statement of Facts. Attest: Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur., Maine.) (Seal Superior Court, State of Maine.)

[fol. 13] IN SUPREME JUDICIAL COURT OF MAINE

STATE OF MAINE

vs.

FIRST NATIONAL BANK OF BOSTON

Sitting: Pattangall, C. J.; Dunn, Sturgis, Barnes, Farrington, JJ.; Philbrook, A. R. J.

OPINION

FARRINGTON, J.:

This case comes up on report on an agreed statement of facts. Edward H. Haskell, a resident of Massachusetts, died testate January 8, 1924. The largest part of the property of the deceased consisted of shares of stock in the Great Northern Paper Company, a corporation organized and existing under the laws of the State of Maine. The will of the deceased was duly probated in the County of Middlesex, Massachusetts, and the above mentioned shares of stock were there subjected to an inheritance tax, of like character to the inheritance tax in Maine, and a tax thereon, amounting to $32,190.53, was paid to the Commonwealth of Massachusetts on legacies and distributive shares, in greater part made up from the proceeds of said stock. Ancillary administration having been taken out in the County of Androscoggin in this state, an inheritance tax of $62,350.41 was assessed by the Probate Court in that county on the property passing by the will of the deceased, and an appeal was taken by the executor from the assessment of this tax by the Androscoggin County Probate Court on the ground that the assessment was unconstitutional, and in violation of Article 4, Section 2, of the Constitution of the United States of America and Article 14 of the Amendments to the Constitution and that the provisions of Chap. 69, Sec. 4, of the Revised Statutes of Maine (1916) were not applied in assessing said inheritance tax because Edward H. Haskell was not a resident of the State of Maine.

After this case was, on an appeal, argued in this court [fol. 14] and while there pending, the parties thereto made the following agreement:

"First. That the following decree be entered in the Probate Court of Androscoggin County:

'STATE OF MAINE,
'Androscoggin:

PROBATE COURT

'Amended Decree

'Whereas, the executors of the will of the late Edward H. Haskell have appealed from the decree of this court assessing a gross inheritance tax of sixty two thousand three hundred and thirty dollars and forty one cents ($62,330.41) and,

'Whereas said appeal was pending before the Law Court for decision and determination, and

'Whereas, the State of Maine, represented by Clement F. Robinson, its Attorney General, and the executors represented by Franklin Fisher, have arrived at the following agreement, namely: that said executors be allowed a credit of thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) being the amount of the inheritance taxes paid by these executors to the Commonwealth of Massachusetts.

'It is therefore ordered, adjudged, and decreed that the gross tax as computed by the court in its original decree determining said inheritance tax to be sixty two thousand three hundred and thirty dollars and forty one cents ($62,330.41) be and hereby is reduced by granting to the estate of Edward H. Haskell credit for inheritance tax paid to the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) leaving a balance of inheritance taxes assessed by the State of Maine of thirty thousand, one hundred and thirty nine dollars and eighty eight cents ($30,139.88).

'February 19th, 1930.

'B. L. Berman, Judge.'

Second. That the attorney general under the statute would bring an action of Debt for the collection of the [fol. 15] amount of tax decreed in the amended decree of the Judge of the Probate Court of Androscoggin County.

Third. That the executors of the will of Edward H. Haskell would avail themselves of any defense possible in said action of debt.

Fourth. That an entry should be entered in the Law Court, 'Appeal Dismissed. Settled below.' "

In accordance with this agreement the decree as quoted above was duly entered on February 19, 1930, and from that decree there has been no appeal and the decree has not been modified, reversed, annulled or satisfied.

Following this the attorney general, under the statute, brought an action of debt for the collection of the tax against the executors of the estate of Edward H. Haskell, the writ being dated April 19, 1930, returnable at the May Term, 1930, of the Superior Court in Cumberland County.

The writ, service of which was accepted by the attorneys for the defendant, was duly entered in court with general appearance on the part of the defendant through its attorneys.

Under the general issue the defendant also filed a brief statement as follows:

"The inheritance tax provided for by Chapter 69 of the Revised Statutes of Maine and additions thereto and amendments thereof is an excise or duty upon the right or privilege of taking property by will or descent under the law of the State of Maine and is assessed on transfers from the dead to the living in those cases where it is by virtue of the laws of the State of Maine that the right or privilege of taking by will or descent at all exists.

"The transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell and transferred by his will is not so transferred as right or privilege of taking by will or descent by virtue of the laws of the State of Maine and it is not by virtue of the laws of this State that the right or privilege of such transfer to the Legatees at all exists. The assessment of an inheritance tax on the transfer of stock in the Great Northern Paper Company owned [fol. 16] by Edward H. Haskell is wholly beyond the power of the State of Maine and an attempt to tax something not within the jurisdiction of the State of Maine contrary to the provisions of the Fourteenth Article of the Articles in Addition to and in Amendment of the Constitution of the United States of America.

"An assessment of an inheritance tax by the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty three cents ($32,-

190.53) was paid by the executors of Edward H. Haskell. As Edward H. Haskell was domiciled in Massachusetts, the situs of his stock in the Great Northern Paper Company for inheritance tax purposes was in Massachusetts. An inheritance tax on the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is beyond the jurisdiction of the State of Maine and constitutes double taxation of intangible property contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America.

"The benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is so small compared with the tax claimed by the State of Maine that it clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation—to spoliation under the guise of exerting the taxing power contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America."

It was further agreed that substantially all of the Great Northern Paper Company's property, including its real estate and mills, are located within the borders of the State of Maine and that, as appears of record in Androscoggin County Probate Court in these proceedings, all the property of the defendant testator with respect to which the decree sued on was based consisted of shares of stock in the Great Northern Paper Company.

On the facts and pleadings as given above the case has [fol. 17] come to this court for determination as to the liability of the defendant for the sum sued for, judgment to be entered for the plaintiff or defendant as this court may find proper.

It is the contention of the State that the decree of the Probate Court of Androscoggin County was final, no appeal or further direct proceedings having been taken in that court after entry of the decree, and that the question of unconstitutionality of the statute, or its administration by the Probate Court, could not be raised collaterally in the

statutory action of debt to collect the tax, but only in a direct proceeding. The State in any event maintains that no constitutional rights have been invaded.

We do not feel that it is necessary to discuss the claim of the state that the judgment upon which the action of debt in the instant case was brought can not be attacked collaterally, under the usual rule as to collateral attack, because of our strong conviction that the cases which are cited below as sustaining the right to tax were properly considered and decided on an entirely different basis from that on which consideration and decision were given to cases involving bonds, certificates of indebtedness, credits for cash on deposit, promissory notes, and advances to and dividends due from corporations created by the taxing state, which latter classes of cases have recently been ruled upon by the Supreme Court of the United States, as will be noted.

The contentions of the administrators of the estate are clearly and fully stated in the brief statement above quoted.

The Supreme Court of the United States in the case of the The Farmers Loan and Trust Company v. Minnesota, 280 U. S., 204, has held that negotiable bonds and certificates of indebtedness, issued by the State of Minnesota and the cities of Minneapolis and St. Paul, were not subject to an inheritance tax in the State of Minnesota, the owner having died testate, domiciled and residing in New York.

In the case of Baldwin et al. v. Missouri, 281 U. S., 586, the same Court has decided that credits for cash deposited [fol. 18] in Missouri banks, U. S. coupon bonds and certain promissory notes, largely secured by liens on Missouri lands and given by Missouri citizens, and all physically within the State of Missouri, were not subject to transfer tax in Missouri, the owner having died testate and domiciled in Illinois.

So also under the same circumstances in the case of Beidler, II et al, Exrs. v. South Carolina Tax Commission, decided by the Supreme Court of the United States on November 24, 1930, indebtedness for advances to and dividends due from a South Carolina corporation were held by the same Court as not subject to tax in the State of South Carolina, under the laws of which the debtor corporation was organized. In this case an effort was made to sustain such a tax by South Carolina on the ground that the indebtedness had a "business situs" in that state but

the court held there was insufficient or no evidence upon which such a claim could be based.

In the case of Beidler, II et al., Exrs. v. South Carolina Tax Commission, supra, the deceased testate, domiciled in Illinois at the time of his death, owned 8,000 shares of stock in the Santee River Cypress Lumber Company, the same corporation against whose indebtedness to the deceased the tax in question was imposed. Payment of the succession tax to South Carolina with respect to the shares of stock was made without any question being raised as to its validity. The Court in the opinion says, "The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value."

Recognizing and being necessarily bound by the three foregoing decisions, as far as they relate to the classes of property therein involved, we feel that the rule there applied does not, and should not, in the case before us, control as to a tax on shares of stock in a corporation organized under the laws of the taxing state and owned by a non-resident decedent.

Farmers' Loan and Trust Company v. Minnesota, supra, denies the right to impose a succession tax on bonds and [fol. 19] certificates of indebtedness, and Baldwin et al. v. Missouri follows Farmers' Loan and Trust Company v. Minnesota as to the right to tax bank deposits, coupon bonds and promissory notes, but those cases and the case of Beidler, II et al. v. South Carolina Tax Commission, supra, which denies the right to tax advances and dividends, do not stand for, and we do not believe they were intended to stand for, the proposition that the state in which a corporation is organized can not impose a tax on the transfer of the shares of stock in such a corporation owned by such non-resident decedent.

Jurisdiction for the purpose of imposing a succession tax exists when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon law of the state levying the tax. Welch et al., Admr. v. Treasurer and Receiver General, 223 Mass., 87; Walker, Admr., v. Treasurer and Receiver General, 221 Mass., 600, 602.

Shares of stock in a corporation organized under the laws of the state levying the tax and belonging to a non-resident decedent are property within the jurisdiction of the taxing state and there subject to an inheritance tax. Bliss et als. v. Bliss et als., 221 Mass., 201, citing Greves, Exr. v. Shaw et als., 173 Mass., 205. See also Moody, Exr. et als. v. Shaw, 173 Mass., 375; Kingsbury et als., Exrs. v. Chapin, 196 Mass., 535; Welch et al., Admr., and Walker, Admr. v. Treasurer and Receiver General, both supra.

The statutory provisions in Massachusetts were, with unimportant variation of language, identical with those of Sec. 1 of Chap. 69, R. S. of Maine (1916), as amended and in force at the death of the testator in the instant case, which were as follows, "All property within the jurisdiction of this State, and any interest therein whether belonging to inhabitants of this State or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject to an inheritance tax for the use of the State. * * *" And in the cases cited below the provisions of law relating to the imposition of inheritance taxes, as far as the principle involved is concerned, were essentially the same.

[fol. 20] In State ex rel, Graff et al. v. Probate Court of St. Louis Co. (Minn.), 150 N. W., 1094, the Court says: "It is usually true that the right to succeed to the ownership of the personal property of a decedent is governed by the law of the domicil of the decedent, and is subject to taxation at the place of such domicil; yet, if the one who succeeds to such ownership must invoke the law of another state before he can reduce such property to possession, or secure the beneficial enjoyment thereof, it is generally, although not universally, held that such other state also has power to exact a tax upon the privilege of taking over and securing the beneficial enjoyment of such property."

Other cases holding that shares of stock in corporations organized under the laws of the taxing state are subject to the tax in the case of non-resident decedent owners are, Douglas County v. Kountze, 84 Neb., 506, 121 N. W., 593, in which the Court says: "The complete devolution of said title must take place under the protection, and according to the laws of Nebraska, and that succession is subject to the inheritance tax"; McDougald, Co. Treas., Applt. v. Lilienthal et al (Cal.), 164 Pac., 387, L. R. A., 1917 F, 267; In re Bron-

son, 150 N. Y., 1, 34 L. R. A., 238, re-affirmed in the case of In re Palmer, 183 N. Y., 238; the principle is also recognized in Gardiner et al, Exrs. v. Carter, State Treasurer, 74 N. H., 507; Commonwealth v. Taylor's Executor (Pa.), 147 At., 71; Northern Central Railway Co., Applt. v. Fidelity Trust Co. et al, Exrs., 152 Md., 94; 136 Atl., 66; In re Culver's Estate, State Treasurer v. Gould, 145 Iowa, 1, 123 N. W., 743, in which the Court says, "It is a general and familiar rule that a corporation is under the jurisdiction and control of the state of its domicile. The State directs the manner and form of its organization. It exercises supervisory power over it during its existence, and finally directs the manner of its dissolution." Carr v. Edwards (N. J.), 87 Atl., 132; Security Trust Co. v. Edwards (N. J.), 101 Atl., 384, and cases cited

[fol. 21] In the case of Neilson et al v. Russell et al, 69 Atl., 476, an earlier New Jersey case reversed on another point and quoted with approval in Carr v. Edwards, Comptroller, supra, the Court says, "In this country, where the general doctrine of the State Courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession taxes by the State that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial" and "the whereabouts of the certificates of stock is immaterial upon the question of the legal situs of the property represented by them."

The principle is also recognized in Commonwealth et al v. Huntington et al, 148 Va., 97, 138 S. E., 650, in which the Court says, "The tax here involved, being a transfer tax, is in its nature a privilege tax as distinguished from a tax upon property. Such a tax can be fairly justified only in consideration of some privilege accorded by the state, and if there is no such privilege accorded, the state can impose no tax. If there is a complete devolution of title consummated by law, outside of the territorial jurisdiction of Virginia, without the necessity either of invoking any of its laws, or the judicial, or official machinery of the State, or the performance of any act by some person in Virginia, there is no basis for such a tax." * * * "The transfer of shares of stock in Virginia corporations owned by non-residents decedents is subject to the transfer tax because

all such transfers are within the jurisdiction of the State. In order to be subject to the tax, as within the jurisdiction of the State, there must be some act of transfer, payment, or delivery, to be done or performed under the authority of the Virginia law." In this case no question was raised as to the validity of the tax on the stock and the court clearly recognizes the principle permitting such tax. Right to tax [fol. 22] bonds of the non-resident decedent was denied on the ground that their transfer required no act to be done or performed by anyone in Virginia or within its jurisdiction.

The Statutes of Maine in force at the date of the testator's death in the present case provided, R. S. 1916, Chap. 51, Sec. 36, as amended by Chap. 49, P. L. 1919, as follows:

"Sec. 36. When the capital of a corporation is divided into shares, and certificates thereof are issued, they may be transferred by indorsement and delivery. The delivery of a certificate of stock of a corporation to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties. Certificates of shares with the seal of the corporation affixed, shall be issued to those entitled to them by transfer or otherwise, signed by such officer or officers as the by-laws shall prescribe. Such officer or officers shall not sign blank certificates, nor sign certificates without knowledge of the apparent title of the persons to whom they are issued, unless the corporation has a duly authorized transfer agent whose duty it is to countersign each certificate issued. In case of the absence or disability of either of the officers authorized by the by-laws to issue shares by transfer or otherwise, the signatures of a majority of the directors in his stead shall be sufficient."

They also provided, R. S. 1916, Chap. 51, Sec. 37, as follows:

"Sec. 37. No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

Secs. 25 and 26 of Chap. 69, R. S. 1916, in force at the date of the testator's death in the instant case, provided as follows:

"Sec. 25. If a foreign executor, administrator or trustee [fol. 23] assigns or transfers any stock in any national bank located in this state or in any corporation organized under the laws of this state, owned by a deceased non-resident at the date of his death and liable to a tax under the provisions of this chapter, the tax shall be paid to the attorney-general at the time of such assignment or transfer; and if it is not paid when due, such executor, administrator of trustee shall be personally liable therefor until it is paid. Subject to the provisions of said section a bank located in this state or a corporation organized under the laws of this state which shall record a transfer of any share of its stock made by a foreign executor, administrator or trustee, or issue a new certificate for a share of its stock at the instance of a foreign executor, administrator or trustee before all taxes imposed thereon by the provisions of this chapter have been paid, shall be liable for such tax in an action of debt brought by the attorney-general."

"Sec. 26. No person or corporation shall deliver or transfer any securities or assets belonging to the estate of a non-resident decedent to anyone unless authority to receive the same shall have been given by a probate court of this state, upon satisfactory evidence that all inheritance taxes provided for by this chapter have been paid, guaranteed or secured as hereinbefore provided. Any person or corporation that delivers or transfers any securities or assets in violation of the provisions of this section shall be liable for such tax in an action of debt brought by the attorney-general."

The foregoing statutory provisions state the law relating to transfers of stock generally and to stock held by non-resident decedents, and indicate the necessity of acts of transfer, payment and delivery to be done and performed under the authority of the Maine law. They indicate and constitute a privilege accorded by the State of Maine and without that privilege there can be no complete devolution of title to the shares of stock involved in this case and the laws of Maine must of necessity be invoked.

In Rhode Island Hospital Trust Co., Exr. v. Doughton, [fol. 24] 270 U. S. S., 69, Chief Justice Taft said, "In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may properly be levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by residents or non-residents."

If the state under whose laws the corporation comes into being has power and jurisdiction to levy a property tax on the shares of stock of that corporation, regardless of the residence of the owner of those shares, it is difficult to see any logical reason why it has not power and jurisdiction to subject those same shares to an inheritance tax whether owned by resident or non-resident decedents.

In Jellenik v. Huron Copper Company, 177 U. S., 1, it was held that shares of stock in a corporation had a situs in the state creating the corporation so that they were there subject to mesne process.

Believing that it is in accord with the overwhelming weight of authority indicated by the cases herein cited, we hold in the instant case that the shares of stock in the Great Northern Paper Company, a corporation organized and existing by virtue of the laws of this state imposing the tax, are within its jurisdiction and there subject to an inheritance tax even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state, and that such a tax does not violate any provision of the Fourteenth Amendment.

Judgment for the State of Maine for $30,139.88, with interest from February 19, 1930.

Actual copy of opinion. Attest:

Edward S. Anthony, Reporter of Decisions, Supreme Judicial Court of the State of Maine.

[fol. 25] IN SUPREME JUDICIAL COURT OF MAINE

CLEMENT F. ROBINSON, Attorney General,

v.

FIRST NATIONAL BANK OF BOSTON, Administrator of the Estate of Edward H. Haskell

MANDATE

Rescript

FARRINGTON, J.:

On report on agreed statement of facts.

Shares of stock in a corporation organized and existing by virtue of the laws of the State of Maine are within its jurisdiction and there subject to an inheritance tax, even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in this State, and such a tax does not violate any provision of the Fourteenth Amendment of the Constitution of the United States.

Judgment for the State of Maine for $30,139.88, with interest from February 19, 1930.

Received March 16th, 1931.

STATE OF MAINE:

Law Court.

Augusta, March 16th, 1931.

STATE OF MAINE, by CLEMENT F. ROBINSON, Attorney General,

vs.

FIRST NATIONAL BANK OF BOSTON, Administrator of the Estate of Edward H. Haskell

In the above entitled case brought before the Court as a Court of Law from the Superior Court for the County of Cumberland, and now pending on the Law Docket, the said case having been heard and maturely considered,

[fol. 26] It is now ordered, that the Clerk of the Law Court now having the custody of the Law Docket enter

upon said docket under said case, and certify to the Clerk of the Superior Court for the County of Cumberland the following order, direction, judgment and decree of the Court in said case, to wit:

Judgment for the State of Maine for $30,139.88, with interest from February 19, 1930.

Attest:

Nellie P. Rackliff, Clerk Law Court.

To Linwood F. Crockett, Esq., Clerk of Courts for the County of Cumberland.

A true copy of Mandate. Attest:

Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur. Maine.) (Seal Superior Court, State of Maine.)

[fol. 27] IN SUPREME JUDICIAL COURT OF MAINE

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final decision and judgment rendered by the Supreme Judicial Court of the State of Maine sitting as a Law Court, in the above entitled cause, the defendant therein, the First National Bank of Boston, Executor of the Estate of Edward H. Haskell, deceased, appellant herein, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said First National Bank of Boston as aforesaid, appellant, assigns the following errors in the record and proceedings in the said cause:

1. Said Supreme Judicial Court erred in refusing to hold that Section 1 of Chapter 69, Revised Statutes of Maine (1916), (as amended and in force at the death of the testator) is (as construed by said Court) repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the imposition of the tax now in question was wholly beyond the power of the State of Maine, being an attempt to tax property not within the jurisdiction of the State.

2. Said Supreme Judicial Court erred in not sustaining the contention of the appellant that the assessment of an inheritance tax on the transfer of stock in the Great Northern Paper Company owned by Edward H. Haskell, was wholly beyond the power of the State of Maine and was an attempt to tax something not within the jurisdiction of the [fol. 28] State contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the imposition of the tax now in question constituted double taxation of intangible property.

4. Said Supreme Judicial Court erred in not sustaining the contention of the appellant that for the State of Maine to assess an inheritance tax on the transfer of stock in the Great Northern Paper Company owned by Edward H. Haskell constituted double taxation of intangible property contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

5. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) is repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that the benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in question is so small compared to the tax claimed by the State of Maine that it clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without just compensation, to spoliation under the guise of exerting the taxing power.

6. Said Supreme Judicial Court erred in not sustaining the contention of the appellant that the benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is so small compared with the tax claimed by the State of Maine that it clearly resulted in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation,—to spoliation under the guise of exerting the taxing power contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

[fol. 29] 7. Said Supreme Judicial Court erred in refusing to hold that said Section 1 (as construed by said Court) deprives the appellant and those claiming under it of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

8. Said Supreme Judicial Court erred in holding and deciding that the shares of stock in the Great Northern Paper Company, a corporation organized and existing by virtue of the laws of Maine, are within the jurisdiction of the State of Maine and there subject to an inheritance tax even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the State of domicile or in the taxing State, and that such a tax does not violate any provision of the Fourteenth Amendment.

9. Said Supreme Judicial Court erred in rendering judgment in favor of the appellee and against appellant.

Prayer for Reversal

For which errors the appellant, the First National Bank of Boston, Executor of the Estate of Edward H. Haskell, deceased, prays that the said judgment of the Supreme Judicial Court of the State of Maine entered March 16, 1931, be reversed and a judgment rendered in favor of the said appellant, and for costs.

Charles L. Hutchinson, Leonard A. Pierce, Franklin Fisher, Counsel for Appellant.

A true copy of Petition for Appeal, Assignment of Errors, and Prayer for Reversal. Attest:

Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur., Maine.) (Seal Superior Court, State of Maine.)

[fol. 30] IN SUPREME JUDICIAL COURT OF MAINE

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause the Supreme Court of the United States from the judgment entered in the above entitled suit by the Supreme Judicial Court of the State of Maine on the 16th day of March, 1931, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Judicial Court of the State of Maine in the above entitled cause, as provided by law, and it is further ordered that the Clerk of Courts within and for the County of Cumberland shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of One thousand dollars ($1,000).

Dated May 29th, 1931.

W. R. Pattangall, Chief Justice of the Supreme Judicial Court of the State of Maine.

[fol. 31] A true copy of Order Allowing Appeal. Attest: Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur. Maine.) (Seal Superior Court, State of Maine.)

[fols. 32 & 33] Bond on appeal for $1,000.00 approved: omitted in printing.

[fols. 34 & 34a] Citation, in usual form, showing service on C. F. Robinson, filed June 5, 1931, omitted in printing.

[fol. 35] In Supreme Judicial Court of Maine

[Title omitted]

Stipulation for Record

The parties hereto by their attorneys of record, hereby stipulate and agree that the Clerk of Courts within and for the County of Cumberland and State of Maine in preparing and making up the record in this cause, shall include therein the following:

1. Plaintiff's Writ.
2. Defendant's Plea.
3. Agreed Statement of Facts and Report.
4. Decision or opinion of the Supreme Judicial Court of the State of Maine.
5. Final Mandate or Judgment of the Supreme Judicial Court of the State of Maine.
6. Petition for Appeal and Assignment of Errors and Prayer for Reversal.
7. Order of the Chief Justice of the Supreme Judicial Court of the State of Maine allowing the Appeal and fixing Bond.
8. Bond as filed and approved.
9. The original Citation, together with the proof and acceptance of service thereof.
10. This Stipulation.

In making up and preparing the record the Clerk will copy all the foregoing papers except the Citation and the proof and acceptance of service thereof and as to such Citation and proof and acceptance of service he will include the originals thereof.

After preparing and making up the record the Clerk will certify to the same and will impress his seal thereon.

Dated June 5, 1931.

C. L. Hutchinson, Leonard A. Pierce, Franklin Fisher, Attorneys of Record for the Appellant.

[fol. 36] Clement F. Robinson, Attorney-General of the State of Maine and Attorney of Record for the Appellee.

A true copy of Stipulation for Record. Attest:
Linwood F. Crockett, Clerk Supreme Judicial Court of the State of Maine and Clerk of the Superior Court of the County of Cumberland, Maine. (Seal Sup. Jud. Cur. Maine.) (Seal Superior Court, State of Maine.)

[fol. 37] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 38 & 39] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION TO PRINT ENTIRE RECORD—Filed June 20, 1931

Comes now the Appellant and adopts its Assignments of Errors as its statement of the points to be relied upon, believing that said Assignments of Errors cannot safely be reduced to a more succinct statement of the points to be relied upon.

(Assignments of Errors are found on pages 27 through 29 of the Transcript of Record.)

And the Appellant represents that the whole of the record as filed is necessary for the consideration of the case, said case having been heard and argued upon an Agreed Statement of Facts, and the Stipulation as to

Transcript of Record having reduced the record to its minimum, in the opinion of counsel.

Charles L. Hutchinson, Leonard A. Pierce, Herbert J. Connell, Franklin Fisher, Counsel for Appellant.

June 17, 1931.

Legal and sufficient service of the above Statement is hereby acknowledged. The Appellee joins in indicating the whole of the record as filed as necessary for the consideration of the case.

Clement F. Robinson, Nathan W. Thompson, Counsel for Appellee.

[fol. 40] [File endorsement omittted.]

Endorsed on cover: File No. 35,985. Maine Supreme Judicial Court. Term No. 171. First National Bank of Boston, Executor of the estate of Edward H. Haskell, deceased, appellant, vs. State of Maine. Filed June 20, 1931. File No. 35,985.

FILE COPY

JUN 29 19

CHARLES ELMORE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

vs.

STATE OF MAINE,
by Clement F. Robinson, Attorney-General,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL, AS REQUIRED BY RULE NO. 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES EFFECTIVE JULY 1, 1928.

CHARLES L. HUTCHINSON,
Attorney for Appellant,
465 Congress Street,
Portland, Maine.

LEONARD A. PIERCE,
HERBERT J. CONNELL,
FRANKLIN FISHER,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1931.

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of
Edward H. Haskell, Deceased,
Appellant,

vs.

STATE OF MAINE,
by Clement F. Robinson, Attorney-General,
Appellee.

No. 171.

STATEMENT OF APPELLANT AS TO JURISDICTION ON APPEAL.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

This appeal is taken under Sections 861(a) and 861(b) of Title 28 of the United States Code as amended April 26, 1928, and under Rule 46 of the Rules of this Court effective July 1, 1928. Under the old practice a writ of error would have been issued under Section 237 of the Judicial Code as amended, by act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 937), being Section 344, Title 28, of the United States Code,

and particularly under Section 237(a) of the Judicial Code as amended providing in part as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * * * *"

B.

Date of Final Judgment and Date of Application for Appeal.

The final judgment of the Supreme Judicial Court of the State of Maine sitting as a Law Court was made and entered on the 16th day of March, 1931. (R. 25).*

The application for appeal was presented and order allowing appeal signed on the 29th day of May, 1931. (R. 30).

C.

Nature of Case and Rulings Below.

1. Facts.

Edward H. Haskell died testate and domiciled in Massachusetts. The largest part of his property consisted of stock in the Great Northern Paper Company, a corporation organized in Maine and having most of its property in Maine. (R. 7).

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* All references to the Record are to the pages of the certified, unprinted Record prepared by the Clerk of Courts for the County of Cumberland, State of Maine, and on file with the Clerk of this Court. The Record has not yet been printed.

The Commonwealth of Massachusetts legally assessed an inheritance tax which was paid of $32,190.53, on legacies and distributive shares made up in greater part of the proceeds of said stock in the Great Northern Paper Co. Ancillary administration of the estate was taken out in Androscoggin County, Maine. (R. 7). The Probate Court of Androscoggin County, Maine, also assessed an inheritance tax of $30,139.88 on said stock (R. 9), and the action in the case at bar was brought for the collection thereof. (R. 10).

The appellant pleaded the general issue (R. 10) and a brief statement in defense (R. 11) that the assessment of said inheritance tax was beyond the power of the State of Maine because the stock in the Great Northern Paper Company did not pass by will or descent from Edward H. Haskell by virtue of the laws of the State of Maine and that Maine was without jurisdiction to assess said tax and that said assessment was an attempt to tax something not within the jurisdiction of the State contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Another statement of defense contended (R. 11) that as an inheritance tax was paid on said stock to the Commonwealth of Massachusetts, the domicile of the owner, the assessment of an inheritance tax by the State of Maine on the transfer of the same stock constituted double taxation contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

Another statement of defense asserted (R. 11) that the benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock was so small compared with the tax claimed that it clearly resulted in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation,—to spoliation under the

guise of exerting the taxing power contrary to the provisions of the Fourteenth Amendment.

An agreed statement of facts reciting in detail the foregoing summary was entered into by both parties (R. 7 to 12) and under statutory authority therefor the case was referred for final decision to the Supreme Judicial Court of the State of Maine sitting as a Law Court. (R. 12).

2. The Statute.

The Statute under which the tax in question was assessed was *Section 1 of Chapter 69, Revised Statutes of Maine (1916),* as amended and in force at the death of the testator, the pertinent language being as follows: (R. 19)

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided. * * * "

In connection with the foregoing statute, the Maine court also considered the following:

> *Section 36, Chapter 51, Revised Statutes of Maine (1916),* as amended by *Chapter 49, Public Laws of 1919,* which relates to the transfer of certificates of stock by endorsement and delivery and the issuance by the corporation of new certificates to those entitled to them by transfer or otherwise and prescribes by whom the certificate shall be signed. (R. 22).
>
> *Section 37, Chapter 51, Revised Statutes of Maine (1916),* which provides that no transfer shall affect the right of the corporation to pay dividends or to treat the record holder as holder in fact until the transfer is recorded on the books of the corporation or a new cer-

tificate issued to the person to whom it has been so transferred. (R. 22).

Section 25, Chapter 69, Revised Statutes of Maine (1916), which provides that if a foreign executor assigns or transfers stock in a corporation organized under the laws of Maine, owned by a deceased non-resident and liable to a tax under the provisions of the chapter, the tax shall be paid to the attorney general at the time of the assignment or transfer, and if not paid when due the executor shall be personally liable therefor until paid. It also imposes a liability for the tax on a bank located in the state or corporation organized under the laws of the state which shall record a transfer of or issue new certificate for such stock before all taxes imposed have been paid. (R. 22).

Section 26, Chapter 69, provides that no person or corporation shall deliver or transfer any securities or assets belonging to the estate of a non-resident decedent to anyone unless authority to receive the same shall have been given by a Probate Court of Maine on satisfactory evidence that all inheritance taxes have been paid or guaranteed. For the violation of this section is imposed a liability for the tax in an action of debt brought by the attorney general. (R. 23).

3. RULINGS OF THE SUPREME JUDICIAL COURT OF MAINE.

The Supreme Judicial Court discussed only the first part of the brief statement in defense and ruled that as the Great Northern Paper Company was a Maine corporation the State of Maine had jurisdiction to assess the tax in question.

The Court did not discuss the jurisdictional point as to whether or not the stock in the Great Northern Paper Company owned by Mr. Haskell passed under his will by virtue of the laws of Maine.

After calling attention to the various statutes referred to *supra* regulating the transfer of stock in Maine corporations the Court said: (R. 23)

> "The foregoing statutory provisions state the law relating to transfers of stock generally and to stock held by non-resident decedents, and indicate the necessity of acts of transfer, payment and delivery to be done and performed under the authority of the Maine law. They indicate and constitute a privilege accorded by the State of Maine and without that privilege there can be no complete devolution of title to the shares of stock involved in this case and the laws of Maine must of necessity be invoked."

In this connection while mentioning that the laws of Maine had to be complied with in order to *complete* a transfer of stock in a Maine corporation the Court did not discuss the question of whether the *transfer* of the stock in question under the will of Edward H. Haskell was a privilege granted by the State of Maine. Nor did the opinion refer to the point raised by the defense that the privilege granted by the State of Maine in this instance in assisting in the transfer of the stock was so small in comparison with the tax demanded that the tax amounted to spoliation under the guise of the taxing power contrary to the provisions of the Fourteenth Amendment.

The Court did not expressly pass upon the contention of the defense that as an inheritance tax of $32,190.53 had already been paid to the Commonwealth of Massachusetts for the transfer of the stock under the will of Edward H. Haskell, for the State of Maine also to assess an inheritance tax on the transfer of the same stock amounted to double taxation contrary to the provisions of the Fourteenth Amendment.

The opinion concludes as follows: (R. 24)

> "Believing that it is in accord with the overwhelming weight of authority indicated in the cases herein cited, we hold in the instant case that the shares of stock in the Great Northern Paper Company, a corporation

organized and existing by virtue of the laws of this State imposing the tax, are within its jurisdiction and there subject to an inheritance tax even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state, and that such a tax does not violate any provision of the Fourteenth Amendment."

In accordance with the Statutes of Maine a rescript prepared by the Court was filed in the office of the Clerk of Courts for the County of Cumberland, which is as follows: (R. 25)

"RESCRIPT FARRINGTON, J.

On report on agreed statement of facts.

Shares of stock in a corporation organized and existing by virtue of the laws of the State of Maine are within its jurisdiction and there subject to an inheritance tax, even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in this state, and such a tax does not violate any provision of the Fourteenth Amendment of the Constitution of the United States.

Judgment for the State of Maine for $30,139.88, with interest from February 19, 1930.

Received March 16th, 1931."

D.

Cases Sustaining the Jurisdiction.

Thus the Federal questions presented by the assignments of error in the appeal now before this Court, were presented to and passed upon by the Supreme Judicial Court of the State of Maine. The decision of the Supreme Judicial Court

of Maine and the judgment entered thereon were in favor of the validity of *Section 1 of Chapter 69, Revised Statutes of Maine (1916)*, as construed and applied by said Court, and denied the claims of the appellant that said statute so construed and applied was repugnant to the Constitution of the United States.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Farmers Loan and Trust Co. v. *Minnesota*, 280 U. S. 204.
Baldwin v. *Missouri*, 281 U. S. 586.
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1.

In each of the cases cited, this Court has assumed jurisdiction on appeal to determine whether a State statute, as construed and applied by the highest Court of the State, is valid under the Constitution and Laws of the United States. These cases are therefore authorities sustaining the jurisdiction of this Court.

We respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

CHARLES L. HUTCHINSON,
Attorney for Appellant,
465 Congress St.,
Portland, Maine.

LEONARD A. PIERCE,
HERBERT J. CONNELL,
FRANKLIN FISHER,
Of Counsel.

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CHARLES ELMORE

Supreme Court of the United States

October Term, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

vs.

STATE OF MAINE,
by Clement F. Robinson, Attorney-General,
Appellee.

Appeal from the Supreme Judicial Court of the State of Maine.

APPELLANT'S BRIEF ON THE MERITS.

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Index.

		PAGE
I.	OFFICIAL REPORTS OF OPINION OF THE COURT BELOW	1
II.	JURISDICTION	2
III.	STATEMENT OF THE CASE	2
IV.	SPECIFICATION OF ASSIGNED ERRORS RELIED UPON	5
V.	ARGUMENT	6
	A. The Issue	6
	B. The tax in question is not a property tax but is an excise tax on the devolution of property from the dead to the living	6
	C. The exclusive situs of the shares of stock involved here, for inheritance tax purposes, was in Massachusetts the domicile of the owner, and Maine the state of incorporation has no right to collect the questioned tax	10
	(1) *Stepping stones leading to Farmers decision*	11
	(2) *Ground upon which the Maine Court bases its decision*	13
	(3) *There is no distinction between registration of bonds and recording transfers of stocks sufficient to warrant a tax for the latter*	16
	(4) *The facts in the Farmers case are almost identical with those in the case at Bar*	18
	(5) *Shares of stock are intangibles or choses in action and as such are embraced within the language of the Farmers, Baldwin and Beidler opinions and should be within the scope of their principle*	18

PAGE

D. Consideration of possible arguments in support of the tax 23

(1) *Cases cited by Maine Court in its opinion* 23

(2) *Application of the Corry, Frick and Doughton cases to the instant case* 24

a. The *Corry* case 24

b. The *Frick* case 28

c. The *Doughton* case 29

VI. CONCLUSION 32

Table of Cases Cited.

Baldwin v. *Missouri*, 281 U. S. 586 ..... 10, 12, 15, 16, 31

Beidler v. *South Carolina Tax Commission*, 282 U. S. 1. 10, 13

Blackstone v. *Miller*, 188 U. S. 189 11

Blodgett v. *Silberman*, 277 U. S. 1 ..... 9, 12, 19, 21, 29

Bronson, In Re, 150 N. Y. 1 24

Corry v. *Baltimore*, 196 U. S. 466 ..... 24, 30

Crowell's Estate, 124 Me. 71 7

Culver, In Re, 145 Iowa 1 24

Eidman v. *Martinez*, 184 U. S. 578 ..... 7, 8

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204 10, 12, 14, 15, 16, 17, 18, 20, 23, 31

Frick v. *Pennsylvania*, 268 U. S. 473 ..... 11, 28

Gardner v. *Carter*, 74 N. H. 507 24

Gilman v. *Gilman*, 52 Me. 165 8

Hannis Distilling Company v. *Baltimore*, 216 U. S. 285 30

Hawley v. *Malden*, 232 U. S. 1 ..... 19, 30

Holmes v. *Adams*, 110 Me. 167 8

Jellenik v. *Huron Copper Mining Co.*, 177 U. S. 1 24

Knowlton v. *Moore*, 178 U. S. 41 7

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283 7

PAGE

Rhode Island Hospital Trust Company v. *Doughton*, 270 U. S. 69 ..... 11, 19, 22, 24, 29
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83 .... 12, 31
State v. *Hamlin*, 86 Me. 495 ..... 7, 10
State v. *First National Bank of Boston*, 130 Me. 123, 154 Atl. (Me.) 103 ..... 1, 13, 14
Susquehanna Power Co. v. *State Tax Commission*, 51 S. Ct. 347 28
Tappan v. *Merchants National Bank*, 19 Wall. 490 30
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 18

Table of Statutes Cited.

Section 1, Chapter 146, Public Laws of Maine, 1893 .. 38
Section 36, Chapter 51, R. S. 1916 ..... 17, 37
Section 37, Chapter 51, R. S. 1916 ..... 14, 38
Section 1, Chapter 69, R. S. 1916 ..... 4, 5, 35
Section 25, Chapter 69, R. S. 1916 ..... 17, 36
Section 26, Chapter 69, R. S. 1916 37

Textbook Cited.

Commerce Clearing House Inheritance Tax Service, Vol. 1, on "Reciprocal Exemptions" 27

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APPELLANT'S BRIEF ON THE MERITS.

I.

OPINION OF THE COURT BELOW.

The first and final opinion of the Supreme Judicial Court of the State of Maine was rendered March 17, 1931: *State of Maine* v. *First National Bank of Boston,* 130 Me. 123, 154 Atl. (Me.) 103. (Printed Transcript of Record herein, P. 11.)

II.

JURISDICTION.

For grounds showing the basis of this Court's jurisdiction, reference is made to Appellant's Statement as to Jurisdiction heretofore filed as required by Rule 12 of the rules of this Court.

III.

STATEMENT OF THE CASE.

(Page references are to the printed Transcript of Record.)

This is an appeal from the final judgment of the Supreme Judicial Court of the State of Maine sitting as a Law Court (R. 26).

Edward H. Haskell died testate, a resident of Massachusetts, January 8, 1924 (R. 5). The largest part of his property consisted of stock in the Great Northern Paper Company, a Maine corporation (R. 6), and concededly most of its property was located in the State of Maine.

Mr. Haskell's will was probated and his estate administered in Massachusetts, which State legally imposed and collected an inheritance tax of $32,190.53 on legacies and distributive shares made up in greater part of the proceeds of said stock in the Great Northern Paper Company (R. 6).

Ancillary administration of the estate was taken out in the State of Maine and an Inheritance Tax of $30,139.88 (after allowing credit for tax paid in Massachusetts) was assessed by the Probate Court of Androscoggin County (R. 7). Although the Decree of the Probate Court assessing the tax and the amount of tax was by consent, nevertheless the Executor of the will expressly reserved the right to avail itself of any defense possible in an action of debt brought to collect the tax assessed under the consent Decree (R. 8).

Thereafter, the action in the case at bar was brought for collection of the tax so assessed (R. 8).

The Appellant herein pleaded the general issue and a brief statement in defense (R. 9) in substance that:

(a) The tax sought to be collected is, under the Statutes of Maine, an excise or duty upon the right or privilege of taking property by will or descent under the law of the State of Maine, and is assessed on transfers from the dead to the living in those cases where it is by virtue of the law of that State that the right or privilege of taking by will or descent at all exists (R. 9).

(b) The transfer of the stock in question was not a transfer as a right or privilege of taking by will or descent by virtue of the laws of the State of Maine, and it is not by virtue of the laws of Maine that the right or privilege of such transfer at all exists. Therefore the assessment of the tax was wholly beyond the power of the State of Maine and was an attempt to tax something not within its jurisdiction contrary to the Fourteenth Amendment of the Constitution of the United States (R. 9).

(c) As the decedent was domiciled in Massachusetts, the situs of the stock owned by him during his lifetime, for inheritance tax purposes, was in Massachusetts, which State collected a transfer tax on said stock. Therefore the imposition by Maine of an inheritance tax on the same stock is beyond the jurisdiction of Maine and constitutes double taxation of intangible property, contrary to the Fourteenth Amendment of the Constitution of the United States (R. 9).

(d) The benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock is so small compared to the tax claimed that the result is such a

flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, to spoliation under the guise of exerting the taxing power contrary to the Fourteenth Amendment of the Constitution of the United States (R. 9-10).

An Agreed Statement of Facts reciting in detail the foregoing was executed by the parties (R. 10) and under statutory authority therefor the case was referred for final decision to the Supreme Judicial Court of the State of Maine sitting as a Law Court (R. 12).

It is admitted by both parties that at the time of Mr. Haskell's death the certificates of stock were held by him in Massachusetts and did not have a "business situs" so called in the State of Maine.

The State contended that the Decree of the Probate Court was final and that the question of the unconstitutionality of the Statute under which the Probate Court took jurisdiction and assessed the tax could not be raised collaterally in this action. This question was not decided by the Supreme Judicial Court of Maine and it based its decision solely on the fact that the Statute under which the tax was assessed was valid under the Constitution of the United States. (See Opinion, R. 15.)

The Supreme Judicial Court of Maine by its opinion and judgment held that the shares of stock in the instant case were within the jurisdiction of Maine and were there subject to an inheritance tax, even though the owner was a non-resident decedent, and regardless of where the certificates of stock were located at the time of the death, and that such tax does not violate any provision of the Fourteenth Amendment (R. 21).

The material portion of the Statute so construed and applied is from *Sec. 1, Chap. 69, R. S. Maine 1916,* as follows:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided. * * * * *."

(The complete Section is set out in the Appendix, p. 35.)

IV.

SPECIFICATION OF ERRORS.

1. The Supreme Judicial Court of Maine erred in refusing to hold that *Sec. 1 of Chapter 69, R. S. Maine 1916* (Appendix p. 35), as construed by said Court, is repugnant to Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that the imposition of the tax was wholly beyond the power of the State of Maine, being an attempt to tax property not within its jurisdiction (R. 24 [1]).

2. The Supreme Judicial Court of Maine erred in refusing to hold that said Sec. 1, as construed by said Court, is repugnant to the Fourteenth Amendment of the Constitution of the United States in that the imposition of the tax constituted double taxation of intangible property (R. 24 [3]).

3. The Supreme Judicial Court of Maine erred in refusing to hold that said Sec. 1, as construed by said Court, is repugnant to the Fourteenth Amendment of the Constitution of the United States, in that the benefit or privilege conferred by the State of Maine, in assisting the transfer of the stock in question, is so small compared to the tax claimed that it clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without just compensation, and spoliation under the guise of exerting the taxing power (R. 24 [5]).

4. The Supreme Judicial Court of Maine erred in holding that the shares of stock in the Great Northern Paper Company, a Maine corporation, are within the jurisdiction of the State of Maine and there subject to an inheritance tax, even though the owner was a non-resident decedent, and regardless of whether the certificates of stock were at the time of death in the State of domicile or in the taxing State, and that such tax does not violate any provision of the Fourteenth Amendment (R. 25 [8]).

5. The Supreme Judicial Court of Maine erred in rendering judgment in favor of the Appellee and against Appellant (R. 25 [9]).

V.

ARGUMENT.

A.

The Issue.

The sole issue to be determined by this Court is whether the State of Maine can constitutionally tax a transfer by will of shares of stock in a Maine corporation, owned, held, and kept at his death outside the State by one domiciled in Massachusetts.

B.

The tax in question is not a property tax but is an excise tax on the devolution of property from the dead to the living.

The tax involved in the case at bar is not a *property* tax imposed upon the living owner of shares of stock but is an *excise* or *duty* imposed on the *devolution* of property by will or descent, a tax on the transfer of property from the dead to the living.

The Maine Court has expressly so held in *State* v. *Hamlin*, 86 Me. 495, at 504, where, in construing *C. 146 of the Public Laws of Maine 1893* (Appendix p. 38), the material provisions of which are identical with the statute now before us, it said:

> "The tax under this statute, is once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the laws of the State."

And again, p. 507:

> "Whether the parties subject to the excise take by will or descent, it is only under and by virtue of the laws of this State that the right or privilege to take at all exists;"

The above case has been cited with approval by this Court in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 288; *Knowlton* v. *Moore*, 178 U. S. 55; and *Eidman* v. *Martinez*, 184 U. S. 591.

In other words, the Maine Court has held that the right or privilege of taking property by will or descent exists only by virtue of the laws of the State granting such right or privilege.

With this doctrine, which we think has practically unanimous acceptance, we are in entire accord. But the stock in the Great Northern Paper Company owned by Haskell at his death being personal, intangible property, passed to his personal representatives not by the law of Maine but rather by the law of Massachusetts, the State of domicile. With this conclusion the Maine Court agrees:

In *Crowell's Estate*, 124 Me. 71 at 73, it said:

> "The succession to and distribution of personal property is regulated, not by the law of the domicile of a decedent's ancestor, but by the law of the domicile of the de-

cedent, in force at the time of his death." (Citing long list of Maine cases.)

In *Holmes* v. *Adams,* 110 Me. 167 at 170, the same Court said:

> "The succession to and disposition and distribution of personal property wherever situated is governed by the laws of the domicile of the owner or intestate at the time of his death, without regard to the location of the property or the place of the death."

And in *Gilman* v. *Gilman,* 52 Me. 165 at 172, the same Court spoke as follows:

> "If the domicile of the testator, at the time of his death, was in New York, then his will should be allowed and recorded in this State as a foreign will. (R. S., c. 64, sec. 8.) And, in that case, the moveable property in this State would be disposed of, under the will, according to the laws of the State of New York. (Jarman on Wills, 2.) But, if his domicile was in this State, then the Probate Court here has original jurisdiction, and our laws must govern the construction of the will, and the disposal of the property." (Citing cases.)

To the same effect is the opinion of this Court in *Eidman* v. *Martinez,* 184 U. S. 578.

There it was held that the transfer upon the death of the owner, a resident of Spain, of certain Federal, municipal, and corporate bonds held by his agents in New York was not taxable under the Federal Inheritance Tax Law of 1898 imposing tax upon personal property passing "either by will or by the intestate laws of any state or territory."

At page 589 of the opinion, the Court said:

> "The tax in question in this case is not upon the property itself, but upon the succession. * * * * Laws im-

posing general taxes upon real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. The actual *situs* of the property in such cases cuts but a small figure, while in the case of *general taxes upon such property* it is now considered determinative of the whole question." (Italics ours.)

And p. 592:

"We do not enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicil as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, *and because the thing taxed, that is, the transmission of the property* to the legatees or next of kin, takes place in a foreign country." (Italics ours.)

In *Blodgett* v. *Silberman*, 277 U. S. at p. 8, under a very similar statute to that of Maine, this Court held that the tax involved was not upon property but upon the right or privilege of succession.

In the language of the Court:

"In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinguished from the tax on property disassociated from its transmission or receipt by will, or as the result of intestacy."

Maine, therefore, has declared that the statute under which the tax in the Haskell case is upheld is an excise on the right of taking property by will or descent under the laws of the State granting that right. Maine then concedes that the right to succeed to the personal estate of a decedent is granted and controlled by the law of the State of domicile of the decedent, and *a fortiori,* without such right which did not exist at common law, no property would pass. "Descent is a creature of statute and not a natural right." *State* v. *Hamlin supra,* 86 Me. 505.

In effect, therefore, in upholding the tax under consideration, Maine has held valid an excise imposed by Maine on a right to succession granted solely by the Commonwealth of Massachusetts, even though prior decisions of the Maine Court referred to supra, and the law of the land expressly decide that Massachusetts and not Maine grants the right.

C.

The exclusive situs of the shares of stock involved here, for inheritance tax purposes, was in Massachusetts, the domicile of the owner, and Maine the state of incorporation has no right to collect the questioned tax.

We submit, as we think we shall later demonstrate, that this Court has squarely decided the issue now before it in the case of *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, hereinafter referred to as the *Farmers* case.

The cases of *Baldwin* v. *Missouri,* 281 U. S. 586, hereinafter referred to as the *Baldwin* case, and *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, hereinafter referred to as the *Beidler case,* but strengthen the rule of the *Farmers* case and extend its application.

It is true that in no one of the three cases just mentioned did any of the intangibles on which a tax was imposed comprise corporate shares of stock. But the scope of the three decisions carried to its logical and practical conclusion, does

and should embrace corporate shares as such, and there is no basis in reason or in logic for a practical distinction between shares of corporate stock on the one hand and bonds, certificates of indebtedness, promissory notes, bank accounts, and the other intangibles on the other.

This case presents directly to the Court the question which has of course been raised in the minds of its members many times before and which has been the subject of keen discussion by members of the Bar and conflicting decisions of Courts of the various States.

(1) Stepping stones leading to Farmers decision.

As depicting the trend of the various decisions which culminated in the rule announced in the *Farmers* case, we propose briefly to outline chronologically what we consider the stepping stones by which the Court reached its conclusion there expressed.

In 1903, in *Blackstone* v. *Miller*, 188 U. S. 189, this Court decided, in an opinion written by Mr. Justice Holmes, that the Fourteenth Amendment did not prevent multiple taxation of intangible (or tangible) personalty. Mr. Justice White dissented.

In 1924, in *Frick* v. *Pennsylvania*, 268 U. S. 473, the Fourteenth Amendment was successfully invoked as a protection against double inheritance tax on *tangible* personal property. In this case, an inheritance tax on shares of stock was imposed by various States of incorporation. The legality of such tax was conceded and the Court in its decision still relied on the doctrine of *Blackstone* v. *Miller* as fixing a rule for intangible personalty "on a different footing" from tangible personalty.

In 1925, in *Rhode Island Trust Company* v. *Doughton*, 270 U. S. 69, the same constitutional guaranty was again successfully invoked, the Court holding that North Carolina, at-

tempting to base its jurisdiction on property of a corporation located within its boundaries, could not collect an inheritance tax on stock of a New Jersey corporation owned by a decedent domiciled in Rhode Island.

In 1927, in *Blodgett* v. *Silberman,* 277 U. S. 1, on a constitutional issue squarely before the Court under the same Amendment, it was held that bonds *and stocks* were intangible choses in action, controlled, as to situs, by the rule of *mobilia sequuntur personam,* and subject to succession tax by the State which was the domicile of the owner. The same reasoning applied to bonds was held applicable to stocks and it was expressly held that Connecticut, in which the testator lived, could levy a succession tax on shares of stock in corporations organized in other jurisdictions.

In 1929, in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, the Court decided that the imposition of a tax by Virginia, where the beneficiaries of a trust resided, on securities in the possession of the trustee in Maryland, to the control or possession of which the beneficiaries had no present right, is in violation of the Fourteenth Amendment. Speaking through Mr. Justice McReynolds, the Court said (p. 93):

> "Here we must decide whether intangibles — *stocks,* bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another State. We think not." (Italics ours.)

In January, 1930, in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* the Court "definitely overruled" the case and doctrine of *Blackstone* v. *Miller* and announced the broad proposition that intangibles and choses in action could have only one tax situs, and that was at the domicile of the owner.

Then followed the case of *Baldwin* v. *Missouri, supra,* which held that an account in a Missouri bank owned by a

citizen of Illinois, and notes given him by citizens of Missouri secured by mortgages of Missouri land recorded in Missouri, were taxable only in Illinois.

And then came the decision in *Beidler* v. *South Carolina*, *supra*, wherein debts due from a South Carolina corporation on open account to a citizen of another State were held immune from taxation in South Carolina.

Thus, since 1924 almost every conceivable type of case, save one identical with the case at Bar, where a citizen of Massachusetts died owning *stock* in a corporation organized under the laws of Maine, has been met and decided, the decision in every instance on the issue directly presented being that an inheritance tax can be levied by one State and by only one State; if the personalty be tangible, by the State where it is located; if the personalty be intangible, by the State of the domicile of the owner. We submit there is neither technical nor practical reason for shares of stock alone of all types of personalty being subjected to double taxation.

(2) Ground upon which the Maine Court bases its decision.

It is a very narrow one.

The Maine Court "recognizing and being necessarily bound" (R. 16) by the opinions of this Court in the *Farmers*, *Baldwin*, and *Beidler* cases "as far as they relate to the classes of property therein involved" (R. 16) expressly bases its finding that the State has power to collect the tax in question upon the provisions of the Maine Statutes relative to transfers of stock generally and to stock held by non-resident decedents as indicating "the necessity of acts of transfer, payment, and delivery to be done and performed under the authority of the Maine law" (R. 20).

The provisions of the Statutes, the Court said (R. 20):

> "indicate and constitute a privilege accorded by the State of Maine, and without that privilege there can be *no complete devolution* of title to the shares of stock involved in this case, and the laws of Maine must of necessity be invoked." (Italics ours.)

The arguments advanced in the *Farmers* case in support of the tax that the obligations taxed were debts of Minnesota and her corporations, subject to her control, that her laws gave them validity, protected them and provided means for enforcing payment and accordingly that the obligations had situs for taxation purposes in that State, were swept aside by this Court in its opinion in that case and were no longer open to the Maine Court as authority for the questioned tax. Of necessity, therefore, that Court had to rely upon the principle that in order to complete the devolution of title to the shares of stock (i.e., to record the transfer on the books of the corporation), the laws of Maine must be invoked.

In other words, the extremely slender support for the tax in the instant case is the existence according to the Maine Court of *Sec. 37, c. 51, R. S. Maine 1916* (Appendix p. 38) which provides that no transfer (of stock) shall affect the right of the corporation to pay dividends or to treat the holder of record as the holder in fact until such transfer is recorded on the books of the corporation or a new certificate issued to the person to whom it has been transferred.

A similar theory was advanced in favor of the constitutionality of the tax in the dissenting opinion of Mr. Justice Holmes in the *Farmers* case but was not adopted by the majority of the Court.

Mr. Justice Stone in his concurring opinion in the *Farmers* case used the following significant language pertinent to the point now under discussion (p. 215):

"In the light of these considerations, granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

Mr. Justice Holmes in the same case in his dissent said (p. 216):

"It may be assumed that the transfer considered by itself alone depends on the law of New York, *but if the law of Minnesota is necessary to the existence of anything beyond a piece of paper to be transferred,* then Minnesota may demand payment for a privilege that could not exist without its help. It seems to me that the law of Minnesota is a present force necessary to the existence of the obligation, and that therefore, however contrary it may be to enlightened policy, the tax is good." (Italics ours.)

Between the theory last outlined and that in the minds of the Maine Court we can see little, if any, difference. Both assume that the transfer of the property occurs under the law of the domiciliary State, a State other than that claiming the questioned tax, but both seek to uphold the tax because either the law of the taxing State or some act therein is necessary to complete the transfer.

We think the *Farmers* case sufficiently repudiates the doctrine of the Maine decision but, if more be necessary, we find it in the attitude of the majority of the Court in the *Baldwin* case, in declining to adopt the reasoning of Mr. Justice Stone underlying his dissent in that case expressed in the following language (p. 597):

"It is true that the bonds and notes located in Missouri are choses in action, rights in which may be trans-

ferred at the domicil of the owner as well as in any other state in which he may chance to be. *But the transfer made there is not completely effected without their delivery, which ordinarily can be compelled only in Missouri and in accordance with its laws.* If negotiable, which so far as appears some of them were, their transfer by delivery within Missouri could defeat the transfer made in Illinois. When secured by mortgage on real estate, the transfer of the security, which is an inseparable incident of the chose in action, * * * * *may be affected by the recording laws,* availed of only through the recording facilities where the land is located. * * * * *"* (Italics ours.)

The learned Justice thus emphasized the importance of "delivery" or "recording" in the State asserting the right to tax. This reasoning was not followed by the majority of the Court and yet the entire premise of the Maine Court's opinion is the necessity for the recording of the transfer in Maine as an incident to the devolution of title becoming complete.

Aside from the foregoing, we submit that complete answer to the reasoning of the principal case is contained in the *Farmers* opinion as follows (p. 208):

> "Registration of certain of the bonds we regard as an immaterial circumstance. So did the court below. Counsel do not maintain otherwise."

(3) There is no distinction between registration of bonds and recording transfers of stocks sufficient to warrant a tax for the latter.

Comparing the registered bonds of the City of Minneapolis with the certificates of stock of the Great Northern Paper Company, the City in the one case is a governmental subdivision of the State of Minnesota certainly fully as much under the jurisdiction of the State as any private manufactur-

ing corporation could be. The executor had to present the bonds within that State in order to have a complete new registration. In the case at Bar, a perfectly good transfer as between the owner and everyone else except the corporation can be made under the authority of *Section 36 of Chapter 51, R. S. 1916,* as amended (Appendix p. 37), without going near the State of Maine or any officer of the corporation. The only limitation is that the corporation would have the right to pay the dividend and to treat the holder of record as the holder until the transfer is recorded on the books of the corporation.

Section 25 of Chapter 69, R. S. 1916 (Appendix p. 36) expressly provides that if a foreign executor or administrator wants to transfer a certificate of stock, he must pay an inheritance tax, and it is largely upon that Section, as we view it, that the Supreme Judicial Court of Maine has rested its decision.

Such reliance, we submit, entirely overlooks the basic principle laid down in the *Farmers* case. This Court in that case was not dealing with refined technical distinctions. All through the opinion the attitude of the Court is obvious. It states that primitive conditions have passed;

> "business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment" (p. 212).

But wealth invested in stocks is certainly entitled to be protected against oppressive discrimination as much as wealth invested in bonds.

The Court says (p. 212):

> *"Taxation is an intensely practical matter* and laws in respect of it should be construed and applied with a

view of avoiding, so far as possible, unjust and oppressive consequences." (Italics ours.)

(4) The facts in the Farmers case are almost identical with those in the case at bar.

In the *Farmers* case, Minnesota asserted the tax, in our case, Maine. In the former case the decedent was domiciled in New York; in the latter, Massachusetts. The estates were probated in New York and Massachusetts respectively. No question of business situs so-called is involved in either case. Some of the bonds in the Minnesota case were registered bonds requiring, as the record in that case discloses, registration in Minnesota for their complete transfer. The shares in the Maine case required recording on the corporation's books in Maine before the transfer would become completely effective. In each case the State of the domicile *legally* imposed and collected a succession tax. In each the securities were kept and held by the owner in the state of domicile. Thus the cases are on all fours one with the other, with the exception which we submit is a trifling one, that in the one the intangibles involved were bonds and certificates of indebtedness and in the other shares of corporate stock.

(5) Shares of stock are intangibles or choses in action and as such are embraced within the language of the Farmers, Baldwin and Beidler opinions and should be within the scope of their principle.

There can be no question, and we think appellee will concede, that shares of corporate stock are "intangibles" or "choses in action" within the universally accepted significance of these two terms.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 at 206:

"There are doubtless cases in the state reports announcing the principle that the ancient maxim of *mobilia se-*

quuntur personam still applies to personal property, and that it may be taxed at the domicil of the owner, but upon examination they all or nearly all relate to intangible property, such as *stocks,* bonds, notes and other choses in action." (Italics ours.)

Hawley v. *Malden,* 232 U. S. 1, at p. 12:

"While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action.*"

Rhode Island Hospital Trust Co v. *Doughton,* 270 U. S. at 81:

"A state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred. In the matter of *intangibles, like* choses in action, *shares of stock* and bonds, the situs of which is with the owner, the transfer tax of course may be properly levied by the state in which he resides." (Italics ours.)

Blodgett v. Silberman, 277 U. S., at p. 18:

"Of course this reasoning necessarily sustains the different view of that court that the transfer of certificates of stock in corporations of other states than Connecticut was taxable in the latter *as the transfer of choses in action.*" (Italics ours.)

Of course it would be presumptuous for us to argue what the Court intended by the language it used in the *Farmers* opinion. The opinion speaks for itself. We cannot help believing, however, that the very careful guaranty the Court accorded to "intangibles" and "choses in action" against taxation in more than one State impliedly if not expressly covered and included shares of corporate stock.

Illustrative of that protection, we quote the following:

"In this Court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the 14th Amendment * * * *. Also, no state can tax the testamentary transfer of property wholly beyond her power * * * *, or impose death duties reckoned upon the value of tangibles permanently located outside her limits * * * *. These principles became definitely settled subsequent to *Blackstone* v. *Miller*, and are out of harmony with the reasoning advanced to support the conclusion there announced.

At this time it cannot be assumed that tangible chattels permanently located within another state may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicil. *Frick* v. *Pennsylvania* is to the contrary" (p. 210).

And again (p. 211):

"Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to *intangibles* with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; * * * *. And, certainly, existing conditions no less imperatively demand protection of *choses in action* against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction" (p. 212). (Italics ours.)

And also (p. 212):

"We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can

find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough seems insufficient to justify the harsh and oppressive discrimination against *intangibles* contended for on behalf of Minnesota." (Italics ours.)

The foregoing excerpts clearly indicate that the Court employed the use of the expressions "intangibles" and "choses in action" interchangeably. Shares of stock being intangibles and choses in action are certainly embraced by the *language* of the *Farmers* decision and should, we submit, be expressly included within its principle.

Blodgett v. Silberman, 277 U. S. 1, is to the same effect. In that case this Court first suggested its doubt as to the constitutionality of double taxation of intangibles (Opinion, p. 10), and on the square issue presented under the 14th Amendment sustained the jurisdiction of Connecticut, the state of the domicile of the owner, to tax *shares of stock* as well as bonds of foreign corporations owned by a resident decedent.

The Court said (p. 9):

"At common law the maxim "*mobilia sequuntur personam*" applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, insofar as it relates to intangible property, including *choses in action,* * * * * that it must be treated as settled in this jurisdiction whether it prove itself to legal philosophic test or not." (Italics ours.)

And again (p. 10):

"For present purposes it suffices that intangible personalty has such a situs at the domicile of its owner that its transfer on his death may be taxed there."

And also (p. 14):

> "The question here is whether bonds, unlike other choses in action, may have a situs different from the owner's domicile such as will render their transfer taxable in the state of that situs, and in only that state. We think bonds are not thus distinguishable from other choses in action."

Of material bearing on the case at bar, the Court said (p. 18):

> "Of course this reasoning necessarily sustains the different view of that Court that the transfer of certificates of stock in corporations of other states than Connecticut was taxable in the latter as the transfer of choses in action."

So, too, in *Rhode Island Hospital Trust Co.* v. *Doughton* (supra), this Court held that a transfer tax on intangibles may properly be levied by the state in which the owner resides.

With the doctrine thus firmly established that the transfer of shares of stock in foreign corporations is taxable in the domiciliary state, no support can be found for the tax in the principal case unless there be announced as to shares of stock alone, a rule entirely different from that applied to every other type of intangible personalty.

Further, we might add, if Maine has the right in this case to tax the stock of the Great Northern Paper Company, shares of stock may be subjected to much more than double taxation. For example, the Boston & Maine Railroad is a corporation under the laws of Massachusetts, Maine, New Hampshire, and New York. It derives its corporate franchise from each of these four States, and if the decision of the Court in Maine in the instant case is correct, a citizen of Pennsylvania who dies owning stock in the Boston & Maine

Railroad must, under the authority of *Blodgett* v. *Silberman* pay an inheritance tax in Pennsylvania and likewise to New York, Massachusetts, New Hampshire, and Maine. Thus, instead of double, we would have quintuple taxation. Some of the transcontinental railroads, we believe, are incorporated under the laws of more than four States, and as to them the result palpably would be even more unfair.

We are unable to understand what there could be in the nature of a share of stock which could justify any such tremendous, and we submit very unfair distinction between it and a bond. Each is personal property, each is intangible personal property, each represents contract rights or choses in action. Each is readily negotiable. A registered bond, for instance, as in the *Farmers* case, is transferred in very much the same manner as a certificate of stock. An examination of the record in the *Farmers* case will show that certain of the registered bonds were transferable only on the registration books of the debtor kept in the State of Minnesota.

Notwithstanding that fact, this Court said:

> "Registration of certain of the bonds we regard as an immaterial circumstance." (Opinion p. 208.)

D.

Consideration of possible arguments in support of the tax.

(1) Cases cited by Maine Court in its opinion.

The majority of the cases cited by the Maine Court in its opinion as sustaining the tax were expressly based in whole or in part, upon the precedent of *Blackstone* v. *Miller*, which is now overruled. Those which do not cite that case with approval dealt with issues distinguishable from that in the case at bar, or at least they were decided at a time when *Blackstone* v. *Miller* was still controlling on the current issue before the Court.

For example, *Re Bronson*, 150 N. Y. 1, *Re Culver*, 145 Iowa 1, and *Gardner* v. *Carter*, 74 N. H., 507, three cases cited by the Maine Court, are generally interpreted and quoted as authority for the theory that a stockholder owns an "aliquot part" of the property of the corporation and that any State within which any property of the corporation is located has jurisdiction to impose a death tax on the transfer of any shares of stock representing part ownership in such property.

Such a doctrine was expressly repudiated by this Court in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. at p. 83, as follows:

> "But whatever the view of the other Courts, that of this Court is clear, that the stockholder does not own the corporate property."

In *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1, also cited by the Maine Court, this Court said at p. 13:

> "Whether the stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State, is a question not presented in this case, and we express no opinion upon it."

The case went to the point only that shares of stock in a corporation had a situs in the State creating the corporation sufficient to subject them there to mesne process.

(2) Application of the Corry, Frick and Doughton cases to the instant case.

a. The Corry case.

We anticipate that the principle announced in *Corry* v. *Baltimore*, 196 U. S. 466, as to an annual property tax, and certain statements of the Court in the *Frick* and *Doughton* cases as to succession taxes, will be claimed by the State as controlling the issue now before this Court.

First of all, it will be noted that in the *Corry* case the tax involved was an annual property tax and not a succession or inheritance tax.

The tax was imposed by a Maryland statute in force at the time the company in question was incorporated, which declared that the *situs* of stock in Maryland corporations owned by non-residents, shall be at the principal office of the corporation in Maryland (Opinion 472). The State Court of Maryland, passing upon the statute, decided that it was in the power of Maryland to fix for the purposes of taxation the *situs* of stock in domestic corporations held by a non-resident. That doctrine was approved by this Court. In other words, the tax was construed to be a tax *"in personam"* against the stockholders and was justified as such on the ground that it was conclusively settled (and conceded in the case) that the State of incorporation has the power to fix the *situs* of stock for purposes of taxation. The tax was upheld on the principle that the sovereignty which creates a corporation has the incidental right to impose regulations on the ownership of stock therein (Opinion 476), and that a regulation establishing the *situs* of stock for the purpose of taxation and compelling the corporation to pay the tax on behalf of the shareholder is not unreasonable. The regulation was an incident to the grant of the charter of the corporation and the stockholder, when he purchased shares, was held to take his stock subject to the prescribed limitation.

But in our case the State of Maine has never attempted, either in effect or expressly, to fix the *situs* of stock in Maine corporations within the State of Maine, either for the purpose of a property tax or to provide for a succession tax.[1]

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[1] NOTE: The Maine statutes are quoted in full in Appendix, pp. 35 to 38, and by the Maine Court in its opinion, R. 17, 19 and 20. For synopsis of the statutes see pp. 4 and 5, Statement of Jurisdiction heretofore filed under Rule 12.

The term "situs" is not used anywhere in the Maine statutes. They completely ignore the theory of situs which was so expressly included in the Maryland statute. They hinge on the mere clerical act of recording the transfer of stock on the books of the corporation. They neither declare a tax situs in Maine nor reserve a power to tax. And the decisions of the Maine Court referred to early in this brief expressly declare that the succession to personal property, wherever situated, is governed by the laws of the domicile of the owner (in this case Massachusetts).

If the *Corry* case and those approving it are good law today and the reasoning of the *Farmers* case is still to be applied, it necessarily follows that shares of stock in a corporation organized under the laws of a state having statutes similar to that of Maryland, have their situs for taxation purposes in the State of incorporation and have no tax situs in the State of the domicile of the owner. Our own idea is that such a result is extremely undesirable and constitutes a step backward from the enlightened view taken by the Court in the *Farmers* decision and in the *Baldwin* and *Beidler* cases.

It seems to us that the logical, practical and consistent position is that the *Farmers* case has established the principle that intangibles cannot longer be subject to more than one tax, based on conflicting theories of tax situs and jurisdiction, and that the power of the State possessing the jurisdiction to tax is exclusive. We submit that the doctrine of *mobilia sequuntur personam* should control the situs of corporate stock for succession and all other tax purposes and that under that rule corporate stock purchased by a non-resident *ipso facto* acquires immediately a tax situs in the State of his domicile; that the State of incorporation cannot by statute fix a different situs for stock owned by a non-resident or reserve power to tax such stock legally beyond its jurisdiction; and that any statute which attempts to fix a different (and hence conflicting and double) tax situs or jurisdiction, is unconstitutional and void.

Thirty-eight of the States of the Union, including Maine, have impliedly adopted the foregoing principle by the passage of the so-called "reciprocal exemption" statutes, in which no distinction is made between stocks and bonds and under which the right of the domiciliary state of the owner of capital stock to impose succession taxes thereon is conceded and asserted and its jurisdiction made exclusive. (See *Commerce Clearing House Inheritance Tax Service*, Vol. 1, on "Reciprocal Exemptions.")

If Maine has and has exercised the legal right to define the manner in which shares of stock in one of its corporations shall pass upon the decease of a non-resident owner, then Maine has the incidental right to levy its tax upon the privilege which it has so conferred. Maine, however, has not attempted to control any such succession. It admits that the stock in question passes by virtue of the law of Massachusetts. It makes no attempt whatever to control, limit, augment or subtract from any privilege granted by Massachusetts. It attempts merely to extract a toll for the exercise of a right which it does not pretend to confer and it seeks to sustain the toll upon the necessity (imposed by it) of a bare clerical act within its boundaries, which it says is necessary to "complete the devolution" of the stock in question. We contend the imposition of that toll under the circumstances is unconstitutional.

An examination of the statute (Appendix p. 37) relative to transfers by a living owner makes this point more [redacted]. In no way does Maine attempt to limit his right and it expressly provides that a transfer not recorded on the books of the corporation shall be valid and effectual against all the world except the corporation itself. In like manner, the transfer by an executor is valid and effective against every one except the corporation itself, and (only if the decision here appealed from be correct) the State.

As to personal property, a will takes effect immediately upon its admission to Probate in the State of the testator's

domicile; as to real estate, when the will is admitted to Probate in the State where the real estate is located. The will of Mr. Haskell as to the stock in question took effect in Massachusetts. The stock then and there passed in accordance with the terms of the will. Maine had made absolutely no attempt to control that passage and the tax here sought to be collected is one for a privilege granted by a sister state and not by the appellee here.

Further, this Court in *Susquehanna Power Company* v. *State Tax Commission*, 51 S. Ct. 347, pointed out that the State Court of Maryland, construing a statute similar to that in the *Corry* case, found that the assessment did not exceed the value of the tangible personal property of the corporation within the state and was in lieu of any direct tax on that property and could well be sustained as an indirect tax. This, we submit, is another feature distinguishing the Maryland statute from that of Maine.

For the above reasons we think *Corry* v. *Baltimore* is distinguishable from the principal case. If the Court should not concur in this view we submit with deference and respect that the *Corry* doctrine should now be held untenable.

b. The Frick case.

In the *Frick* case, the question of the validity of the transfer taxes collected by the States where the corporations were organized, the stock of which was owned and held by Frick in Pennsylvania, was neither in issue nor was it discussed. The tax was paid by the executors without questioning the power of the States to impose the tax.

The Court, however, said (p. 497):

> "As those states had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates."

It is obvious that this is *dictum* and is rested on the very ground urged by Mr. Justice Holmes in his dissenting opinion in the *Farmers* case. If not so treated, however, we submit it is clearly overruled by implication by the *Farmers* case.

After stating the rule of the *Frick* case that tangibles with permanent situs therein and their testamentary transfer, may be taxed only by the State where found, the Court in the *Farmers* case in the next sentence of the opinion (p. 211) says:

> "And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction."

And in *Blodgett* v. *Silberman*, 277 U. S. 1, at p. 17, this Court refused to extend the rule of the *Frick* case from tangible property to bonds and reversed the holding of the Connecticut Court sustaining a tax on the latter. We submit the same ruling should be made as to shares of stock.

c. The Doughton case.

In support of its conclusion, the Maine Court quotes with approval (R. 21) the statement of Chief Justice Taft in the *Doughton* case at p. 81 of the opinion, as follows:

> "So, too, it is well established that the state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents."

This statement is *dictum*.

The issue in the *Doughton* case was whether North Carolina could validly impose an inheritance tax on shares of stock owned by a non-resident in a business corporation of New Jersey because the corporation did business and had two-thirds of its property in North Carolina (Opinion, p. 80). The Court held the North Carolina taxing statute invalid. In support of his statement above quoted, the learned Chief Justice cited *Hawley* v. *Malden*, 232 U. S. 1; *Hannis Distilling Company* v. *Baltimore*, 216 U. S. 285; *Corry* v. *Baltimore*, 196 U. S. 466, and *Tappan* v. *Merchants National Bank*, 19 Wall. 490.

An examination of these cases discloses that the tax in every instance was a property tax and not an inheritance tax.

In the *Hawley* case (p. 12 of the Opinion) the Court queried:

> "Whether, in the case of corporations organized under state laws, a provision by the state of incorporation fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other States in which their owners reside is a question which does not arise upon this record and need not be decided."

For present purposes, it is unnecessary to decide whether the reasoning of the Court in the *Farmers* case is inconsistent with that in the *Corry* case. We think it sufficient here to reiterate that there is no pretense on the part of Maine that its legislature has fixed the situs of the stock in question in Maine, for the purposes of taxation. If the situs had been so fixed in Maine, the executor here might well have raised in Massachusetts the issue suggested by the above quotation from the *Hawley* case. Maine, however, having made no attempt to fix such a situs, the executor had no choice except to pay the inheritance tax in Massachusetts, wherein the owner was domiciled at the time of his death.

Aside from the foregoing, the *dicta* of the Court above referred to in the *Frick* and *Doughton* cases respectively, falls within the prohibition announced by the Court in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, at p. 94.

The Court, citing certain cases, said:

> "Any general statement in the above opinions which may seem to interfere with the conclusion here announced must be limited and confined to the precise situation then under consideration.
>
> It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

We think it self-evident that the occurrence of a single transfer of property in more than one State is an impossibility.

In the *Farmers* case, Mr. Justice Stone in his concurring opinion said, p. 214:

> "to sustain a privilege tax, the privilege must be enjoyed in the State imposing it *****. It is enough, I think, to uphold the present decision that the transfer was effected in New York by one domiciled there and is controlled by its law."

And in the *Baldwin* case after citing the *Farmers* case, this Court said, p. 593:

> "So far as disclosed by the record, the situs of the credit was in Illinois where the depositor had her domicile. *There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not otherwhere.*" (Italics ours.)

VI.

CONCLUSION.

Certainly it seems logical and consistent that, if the difference between tangible personalty and intangible personalty is "insufficient to justify the harsh and oppressive discrimination against instangibles contended for on behalf of Minnesota," the difference between stocks and bonds, although obvious enough, is all the more insufficient to justify the harsh and oppressive discrimination against stocks contended for on behalf of Maine.

The proper conduct of business and the maintenance in the Nation of good relations between the States require, as this Court found in the *Farmers* case, that he who loans money to a corporation should not, upon his death, be penalized by double inheritance taxes.

The investor in shares of stock acquires no absolute and paramount obligation to pay but only an interest in the equity of the corporation and much more than the bondholder, assumes the business risk of success or failure of the enterprise in which his money is hazarded.

Does not sound public policy require that he also, along with the bondholder, be protected at his death against the payment of double inheritance taxes?

Business can no more be conducted without the sale and purchase of stocks than it can be without bonds, and no argument except one based on the most refined technicalities can start with the premise that double taxation of bonds is not permissible while that of stocks is entirely proper.

We submit the judgment of the Maine Court in the case at bar should be reversed.

Respectfully submitted,

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APPENDIX.

The following citations of Maine Statutes are by Chapter and Section number of the 1916 Revised Statutes of Maine, as amended and in force at the death of the testator in the instant case.

Section 1, Chapter 69, R. S. 1916:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, by allowance of a judge of probate to a widow or child, by deed, grant, sale or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, and except as herein otherwise provided, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, except to or for the use of any educational, charitable, religious or benevolent institution in this state, shall be subject to an inheritance tax for the use of the state as hereinafter provided. Property which shall so pass to or for the use of (Class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the adoptive parent, the wife or widow of a son, or the husband of a daughter of a decedent, shall be subject to a tax upon the value of each bequest, devise or distributive share, in excess of the exemption hereinafter provided, of one per cent if such value does not exceed fifty thousand dollars, one and one-half per cent if such value exceeds fifty thousand dollars and does not exceed one hundred thousand dollars, and two per cent if such value exceeds one hundred thousand dollars; the value exempt from taxation to or for the use of a husband, wife, father, mother, child, adopted child or adoptive parent shall in each case be ten thousand dollars, and the value exempt from taxation to or for the use of any other member of (Class A) shall in each case be five hundred dollars. Property which shall so pass to or for

the use of (Class B) a brother, sister, uncle, aunt, nephew, niece or cousin of a decedent, shall be subject to a tax upon the value of each bequest, devise or distributive share in excess of five hundred dollars, and the tax of this class shall be four per cent of its value for the use of the state if such value does not exceed fifty thousand dollars, four and one-half per cent if its value exceeds fifty thousand dollars and does not exceed one hundred thousand dollars and five per cent if its value exceeds one hundred thousand dollars. Property which shall pass to or for the use of any others than members of Class A, Class B and the institutions excepted in the first sentence of this section, shall be subject to a tax upon the value of each bequest, devise or distributive share in excess of five hundred dollars, and the tax of this class shall be five per cent of its value for the use of the state if such value does not exceed fifty thousand dollars, six per cent if its value exceeds fifty thousand and does not exceed one hundred thousand dollars and seven per cent if its value exceeds one hundred thousand dollars. Administrators, executors and trustees, and any grantees under such conveyances made during the grantor's life shall be liable for such taxes, with interest, until the same have been paid."

Section 25, Chapter 69, R. S. 1916:

"Subject to the provisions of the preceding section if a foreign executor, administrator or trustee assigns or transfers any stock in any national bank located in this state or in any corporation organized under the laws of this state, owned by a deceased non-resident at the date of his death and liable to a tax under the provisions of this chapter, the tax shall be paid to the attorney-general at the time of such assignment or transfer; and if it is not paid when due, such executor, administrator or trustee shall be personally liable therefor until it is paid. Subject to the provisions of said section a bank

located in this state or a corporation organized under the laws of this state which shall record a transfer of any share of its stock made by a foreign executor, administrator or trustee, or issue a new certificate for a share of its stock at the instance of a foreign executor, administrator or trustee before all taxes imposed thereon by the provisions of this chapter have been paid, shall be liable for such tax in an action of debt brought by the attorney-general."

Section 26, Chapter 69, R. S. 1916:

"Subject to the provisions of section twenty-four no person or corporation shall deliver or transfer any securities or assets belonging to the estate of a non-resident decedent to anyone unless authority to receive the same shall have been given by a probate court of this state, upon satisfactory evidence that all inheritance taxes provided for by this chapter have been paid, guaranteed or secured as hereinbefore provided. Any person or corporation that delivers or transfers any securities or assets in violation of the provisions of this section shall be liable for such tax in an action of debt brought by the attorney-general."

Section 36, Chapter 51, R. S. 1916:

"When the capital of a corporation is divided into shares, and certificates thereof are issued, they may be transferred by indorsement and delivery. The delivery of a certificate of stock of a corporation to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties. Certificates of shares with the seal of the corporation affixed, shall be issued to those entitled to them by transfer or otherwise, signed by such officer or officers as the by-laws shall prescribe.

Such officer or officers shall not sign blank certificates, nor sign certificates without knowledge of the apparent title of the persons to whom they are issued, unless the corporation has a duly authorized transfer agent whose duty it is to countersign each certificate issued. In case of the absence or disability of either of the officers authorized by the by-laws to issue shares by transfer or otherwise, the signatures of a majority of the directors in his stead shall be sufficient."

Section 37, Chapter 51, R. S. 1916:

"No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

Section 1, Chapter 146, Public Laws of Maine, 1893:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of the daughter of a decedent, shall be liable to a tax of two and a half per cent of its value, above the sum of five hundred dollars, for the use of the state, and all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed."

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DEC 9 1

CHARLES ELMORE

Supreme Court of the United States

October Term, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

vs.

STATE OF MAINE,
by Clement F. Robinson, Attorney-General,
Appellee.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. THE SHARES IN QUESTION HAD NO "BUSINESS SITUS" IN MAINE, AND THE "BUSINESS SITUS" OF THE CORPORATION ISSUING SUCH SHARES IS IMMATERIAL.

To counsel for Appellant, the argument of the Attorney General as to "business situs" (Page 9 et seq. of his brief) is not clear. He admits that the certificates themselves had no business situs in Maine. They were kept by the owner in Massachusetts where he was domiciled. He was not engaged in any business within the State of Maine, and employed no local agent there to conduct any business. All the cases decided by this Court relative to business situs so-called, with which we are familiar, are based upon a situation where a

non-resident of a state has for some reason chosen to localize within that state the *intangibles* owned by him which were involved in the particular case.

The brief for the State of Maine is the first instance known to us of a contention that a business situs may be attached to shares of stock because the corporation issuing the shares does business within the state seeking to impose the tax. We submit that there is no logical reason for sustaining this novel contention.

Rhode Island Hospital Trust Company v. *Doughton*, 270 U. S. 83, clearly settles so far as this Court is concerned the principle that the ownership of the property is in the corporation and that its stockholders are not owners of an aliquot part of the corporate property. If then, the defendant's testator kept his certificates outside the State of Maine, as is admittedly the fact, and if, as this Court has held, the ownership thereof gave him no title to any of the property of the corporation, he owned no property in Maine and no question of business situs in Maine can arise.

In the *Farmers* case, certainly the situs of Minneapolis and St. Paul was in Minnesota, as much as the property of the corporation in the instant case had a situs in Maine. Yet this Court held that no question of business situs there arose.

II. THE TAX SOUGHT TO BE IMPOSED BY MAINE IS A "DOUBLE" OR "MULTIPLE" TAX. THE "SPLIT TAX" THEORY ADVANCED BY THE STATE IS UNTENABLE.

The Attorney General of Maine (Page 21 et seq. of his brief) has devised another unique theory to defend the double taxation sustained by the Maine Court. He suggests that as to shares of stock, the proper method of taxation is for the state of domicile to levy a tax and the state of incorporation likewise, and that this is what was done in the present case. He then suggests that this does not amount to double taxa-

tion but is as he calls it a "split tax", and in an ingenious and interesting dissertation contends that it should be upheld as such and so constitutes an ideal solution of the problem.

The facts are not in accord with his suggestion. Massachusetts, the state of domicile of the owner, levied and collected all the tax collectible under its laws without any reference to what, if any, tax was payable under the laws of the state of incorporation. When Maine, therefore, seeks to impose any tax in addition to the Massachusetts tax, the burden upon the Estate is increased and we have a clear case of double or multiple taxation. If Maine has the right to impose the tax here in question, it could not be urged that it was under any obligation to give credit for the tax paid Massachusetts, save only that it makes a like deduction in the case of its own residents under one of its own statutes expressly providing for such deduction. We submit it is not a question of the mathematical amount of the tax imposed, but of the right of the state of incorporation to levy any tax for the privilege of devolution granted and taxed by the state of domicile.

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DEC 9 19
CHARLES ELMORE CR

Supreme Court of the United States

October Term, 1931

No. 171

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

v.

STATE OF MAINE,
By Clement F. Robinson, Attorney General
Appellee.

Appeal from the Supreme Judicial Court of the State of Maine.

BRIEF FOR THE STATE OF MAINE

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INDEX

		Page
A.	STATEMENT OF THE CASE	1
B.	ARGUMENT	5
	I. *Aside from questions of double taxation the incorporating state does and should have the power to require an inheritance tax on the transfer of shares*	5
	(a) *It does have this power to tax*	5
	(b) *This power to tax is an incident of the jurisdiction of the state over shareholders in its corporations*	6
	(c) *This jurisdiction of a state over shareholders in its corporations has been affirmed by this court*	7
	(d) *The Maine statutes exercise this jurisdiction*	8
	II. *"Business situs"*	9
	III. *The recent Supreme Court cases do not necessarily deprive the State of Maine of its right to an inheritance tax on this transfer*	11
	IV. *If practicable both the state of the incorporation and the state of the domicile should retain the right to an inheritance tax on this transfer*	12
	(a) *To avoid overruling cases*	13
	(b) *To accomplish a desirable object as a matter of principle*	16
	(c) *And as a matter of public policy*	19
C.	CONCLUSION	27
D.	REPLY BRIEF	28

Table of Cases Cited

	Page
Baker v. Baker, 242 U. S. 394 (1916)	6
Baldwin v. Missouri, 281 U. S. 586 (1930)	3, 13, 20, 21, 26
Beidler v. So. Carolina Tax Commission, 282 U. S. 1 (1930)	3, 6, 10, 11, 13, 21
Blackstone v. Miller, 188 U. S. 189 (1903)	13
Blodgett v. Silberman, 277 U. S. 1 (1928)	4, 6
Bonaparte v. Appeal Tax Court, 104 U. S. 592 (1881)	14
Bristol v. Washington County, 177 U. S. 133 (1900)	10
Re Bronson, 150 N. Y. 1; 34 L. R. A. 238; 55 A. S. R. 632; 44 N. E. 707 (1896)	6
Buck v. Beach, 206 U. S. 392 (1907)	14, 20
Citizens Bank v. Durr, 257 U. S. 99 (1921)	15
Coe v. Errol, 116 U. S. 517 (1886)	24, 25
Corry v. Baltimore, 196 U. S. 466 (1904)	6
Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920)	14
Deganay v. Lederer, 250 U. S. 376 (1919)	10
Equitable Trust Co. v. Kentucky State Tax Commission, County Court, Jefferson County, Kentucky, December 13, 1930, reported in 204 C. C. H. 11,174	4
Estate of Lund,—Benson v. Minnesota, Supr. Court of Minnesota, May 15, 1931, reported in 236 N. W. 626, and 204 C. C. H. 11,414	4
Estate of Sack,—Industrial Trust Company v. Tax Commission, 250 N. Y. Supp. 113 (May 15, 1931)	4
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930)	3, 9, 13, 17, 19, 21, 24, 26
Fisher v. Brucker, 41 Fed. (2d) 774, (D. C. Michigan 1930)	4
Fort Smith Co. v. Arkansas, 251 U. S. 532 (1920)	14
Frick v. Pennsylvania, 268 U. S. 473 (1925)	5, 24
Gates v. Bank of Commerce, Supr. Court, Arkansas, June 29, 1931, reported in 204 C. C. H. 11,490	4
Glen v. Liggett, 135 U. S. 533 (1890)	8
Hawley v. Malden, 232 U. S. 1 (1913)	6

Table of Cases Cited

	Page
Hellmich v. Hellman, 276 U. S. 233 (1928)	14
Hill v. Carter, 47 Fed. (2nd) 869; (C. C. A. 9th Circuit, March 9, 1931)	10
Hunt v. Perry, 165 Mass. 287 (1896)	15
Jellnick v. Huron Co., 177 U. S. 1 (1900)	7
Kidd v Alabama, 188 U. S. 730 (1902)	14
Kirtland v. Hotchkiss, 100 U. S. 491 (1879)	14
Liverpool, etc., Co. v. New Orleans, 221 U. S. 346 (1911)	10
Maxwell v. Bugbee, 250 U. S. 525 (1919)	15
Metropolitan Life v. New Orleans, 205 U. S. 395 (1907)	10
New Orleans v. Stempel, 175 U. S. 309 (1899)	10
Paddell v. New York, 211 U. S. 446 (1908)	15
R. I. Hospital Trust Co. v. Doughton, 270 U. S. 69 (1926)	5, 9
Rogers v. Hennepin Co., 240 U. S. 184 (1916)	15
Rogers Estate, 149 Mich. 305 (1907)	15
Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929)	3
Schlesinger v. Wisconsin, 270 U. S. p. 230 (1926)	20
Southern Pacific Co. v. Kennedy, 222 U. S. 63 (1911)	24
State Board v. Comptoir, 191 U. S. 388 (1903)	10
State v. Hamlin, 86 Me. 495 (1894)	2
State v. Probate Court, 145 Minn. 155 (1920)	15
State Tax on Foreign Held Bonds, 15 Wall. 300 (1873)	14
Swiss Oil Co. v. Shanks, 273 U. S. 407 (1927)	14
Tappan v. Merchants' National Bank, 19 Wall. 490 (1874)	7
Union Refrigerator &c Co. v. Kentucky, 199 U. S. 194 (1905)	17
Welch v. Boston, 231 Mass. 155 (1915)	15
Wheeler v. Sohmer, 233 U. S. 434 (1913)	13

Table of Statutes Cited

Revised Statutes of Maine (1916) *Chapter* 69, *Section* 1	2
Chapter 69, *Section* 4	2, 21
Chapter 51	8

Table of Textbooks Cited

	Page
Commerce Clearing House, Inheritance Tax Service, Edition 1928-30, February 5, 1929, page 63	19
14 *Corpus Juris*, 318	11

Supreme Court of the United States

October Term, 1931

No. 171

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

v.

STATE OF MAINE,
Clement F. Robinson, Attorney General,
Appellee.

BRIEF FOR THE STATE OF MAINE

A.

STATEMENT OF THE CASE

The only question in this case is the constitutionality of the provision in the statutes of Maine whereby an inheritance tax of $30,139.88 was levied by the taxing authorities of Maine upon the Estate of Edward H. Haskell, a resident of Massachusetts, by reason of the transfer under his will of shares of stock in the Great Northern Paper Company, a Maine corporation. Substantially all the property of the corporation, including real estate and mills, is located in Maine.

The inheritance tax originally assessed in Maine was over twice the amount of the present tax; viz, $62,330.41. An appeal from this assessment was taken to the highest court of the state, because an inheritance tax of $32,190.53, paid in Massachusetts, had not been allowed as a deduction.

Section 4 of the Maine Act, thus brought into issue, is as follows:

> "Property belonging to a deceased resident of this state which shall be distributed by order of the probate court subsequent to the second day of July, nineteen hundred nine, and which is not therein at the time of his death, shall not be taxable under the provisions of this chapter if legally subject in another state or country to a tax of like character and amount to that imposed by section one, and if such tax be actually paid or guaranteed or secured in accordance with the law of such other state or country; if legally subject in another state or country to a tax of like character, but of less amount than that imposed by section one and such tax be actually paid, guaranteed or secured as aforesaid, such property shall be taxable under the provisions of section one to the extent of the difference between the tax thus actually paid, guaranteed, or secured, and the amount for which such property would otherwise be liable under this chapter."

This appeal was dismissed by consent, the claimed deduction was allowed, and a judgment decree was entered in the Probate Court for the balance; to-wit, $30,139.88, this amount carrying interest from February 19, 1930.

The case is before the Supreme Court of the United States on appeal from a judgment of the Supreme Judicial Court of the State of Maine, sitting as a court of law, on a Superior Court report of the agreed facts in an action of debt brought by the Attorney General of the state to collect the Probate Court judgment decree above referred to.

The inheritance tax law of Maine is found in the Revised Statutes of Maine (1916) Chapter 69, Section 1 (*Record* p. 17), and has been held constitutional by the Maine courts,—*State v. Hamlin*, 86 Me. 495 (1894). The power of Maine to tax shares of stock in its own corporations under this statute has not hitherto been disputed, and as far as Maine law is concerned, is affirmed by the Supreme Court of Maine in this present case. All proceedings were taken effectively as far as the laws of Maine are concerned for taxing the property.

The case adds another problem to those recently considered by this court in four significant cases,—

Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929)
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930)
Baldwin v. Missouri, 281 U. S. 586 (1930)
Beidler v. So. Carolina Tax Commission, 282 U. S. 1 (1930)

In brief, here is a chain of four links:

Safe Deposit-Virginia case,—no property tax in Virginia against Virginia beneficiaries on the whole value of a trust with securities kept and held in Maryland. Two of the court concur in result; one dissents.

Farmers Loan-Minnesota case,—no inheritance tax in Minnesota on transfer of Minnesota state and city bonds kept in New York belonging to a New York owner. New York inheritance tax paid. One of the court concurs in the result; two dissent.

Baldwin-Missouri case,—no inheritance tax in Missouri on transfer of bank deposits in Missouri banks, notes of Missouri citizens in part secured by Missouri mortgages, and U. S. bonds, all belonging to an Illinois resident and deposited in Missouri, apparently for permanent safe keeping. Illinois inheritance tax paid. Three of the court dissent, joining in two opinions.

Beidler-South Carolina case,—no inheritance tax in South Carolina on transfer of debts owed by South Carolina corporation doing business in South Carolina to Illinois resident shareholder. Estate conceded South Carolina inheritance tax on the shares. Illinois inheritance tax paid. No business situs as a fact in South Carolina. Two of the court concur unwillingly.

We shall refer to the three inheritance tax cases in this chain as "the recent Supreme Court cases." In none of them is there any indication that either state gave any credit in its tax assessment for the tax payable or paid in the other.

The present case brings two situations before this court for the first time since these four cases arose,—(1) multiple inheritance taxation where the tax paid in one state has been credited on the litigated tax demanded by the second state; and (2) an issue over the inheritance taxation of corporate shares. During the pendency of the present case, however, the latter problem has been before other courts with the following result:

Fisher v. Brucker, 41 Fed. (2d) 774, (D. C., Michigan 1930). Question of the right of Michigan to impose an inheritance tax upon the transfer of domestic shares of a non-resident owner not passed upon because reciprocity between Michigan and the non-resident's state was retro-actively effective. Appeal to C. C. A. dismissed on ground of lack of jurisdiction.

Estate of Sack,—Industrial Trust Company v. Tax Commission, 250 N. Y. Supp. 113, (May 15, 1931). Petition for vacating assessment of inheritance tax on transfer of New York shares of a non-resident, under 1909 Tax Law, dismissed on procedural grounds. The court ruled that *Re Bronson*, 150 N. Y. 1, justifying such taxation, remains law in New York unless or until overruled by competent authority.

Equitable Trust Co. v. Kentucky State Tax Commission, County Court, Jefferson County, Kentucky, December 13, 1930,—reported in 204 C. C. H. 11, 174, now pending on appeal in the Court of Appeals of Kentucky. Transfer of Kentucky corporation shares of a non-resident decedent held untaxable under the Kentucky inheritance tax law.

Gates v. Bank of Commerce, Supreme Court of Arkansas, June 29, 1931,—reported in 204 C. C. H. 11,490,—transfer of shares in Arkansas corporation with business and property located in Arkansas, belonging to Tennessee shareholder keeping his certificates in Tennessee, held taxable under Arkansas Inheritance Tax.

Estate of Lund,—Benson v. Minnesota, Supreme Court of Minnesota, May 15, 1931,—reported in 236 N. W. 626, 204 C. C. H. 11,414,—Minnesota inheritance tax enforced on transfer of shares of Wisconsin stockholder in Minnesota corporations having sole place of business and substantially all property in Minnesota.

B.

ARGUMENT

I.

Aside from questions of double taxation the incorporating state does and should have the power to require an inheritance tax on the transfer of shares.

(*a*) *It does have this power to tax.*

But for the possibility of double taxation which is progressively discussed in the four recent Supreme Court cases abovementioned, there can be no doubt but that the Maine inheritance tax in this case would be valid. Maine's highest court says so in the very case, and the cases elsewhere are a unit in favor of the power of the state of incorporation to tax the transfer of shares in such a corporation either inter vivos or at the death of the owner, as well as to tax the shares themselves as property, and this quite irrespective of the location of the property or business of the corporation.

In *R. I. Hospital Trust Co. v. Doughton*, 270 U. S. 69 (1926) this court rules against any inheritance tax in North Carolina on New Jersey shares of a Rhode Island citizen, even though the corporation is in business and has property in North Carolina, the opinion stating that,—

> "The state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents,"

and that,—

> "The shares have a situs in the state of incorporation."

In *Frick v. Pennsylvania*, 268 U. S. 473 (1925) in ruling that Pennsylvania cannot collect an inheritance tax on a Pennsylvanian's tangible personalty located in Massachusetts, *the court approves the practice in the case of deducting, in computing the Pennsylvania tax on Massachusetts corporation shares, the inheritance tax already paid in Massachusetts.*

In *Baker v. Baker*, 242 U. S. 394 (1916), in passing on the claim of the mother of an intestate to share in his personal property, in a case where the domicile of the decedent was in issue, the Court says that,—

> "It is equally clear that the state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner and tax the succession."

The Court cites New York, Massachusetts, New Jersey and Illinois cases to this point.

Re Bronson, 150 N. Y. 1; 34 L. R. A. 238; 55 A. S. R. 632; 44 N. E. 707 (1896) is the leading state case on the point. Other cases are cited and quoted from in the Maine Court's opinion in the present case. (*Record* pp. 17-20). The cases are collected in a note in 42 A. L. R., pp. 365-6.

It is noteworthy that in the recent *Beidler-South Carolina* case the representatives of the estate did not question the power of the state of the incorporation to tax.

These inheritance tax cases originated in, and are a corollary to the well-established doctrine that the state of the incorporation may tax such shares under its property tax. The leading case is,—*Corry v. Baltimore*, 196 U. S. 466 (1904).

The cases affirming the corresponding power of the state of the domicile under inheritance and property taxes are not in point on our present contention. See for instance,—*Hawley v. Malden*, 232 U. S. 1 (1913); *Blodgett v. Silberman*, 277 U. S. 1 (1928).

(*b*) *This power to tax is an incident of the jurisdiction of the State over shareholders in its corporations.*

The ultimate basis and justification of this power of the state is the fact that the state created, protects and sustains the corporation. The stockholder has an interest in an entity

which came into being and exists only by the statutes of that state. By that law are its powers determined; under that law its management operates; to that jurisdiction must he and it go for instruction in case of doubt, and for permission to enforce and change the rights, duties or powers of the corporation and its shareholders; and in the courts of that state must it be dissolved when its end comes.

The Great Northern Paper Company receives its primary existence from the laws of Maine. Its right to own property and pay dividends to its shareholders, and their right to receive them, come from the laws of Maine. If one situs for the stock is sought, Maine has more grounds for claiming it than has Massachusetts. The entire capital stock of the corporation is employed in Maine, or if employed elsewhere it is only through the power given it by Maine.

On the fundamental economic and political theory that taxation and protection may well go hand in hand, Maine should therefore have the right to tax the shareholder.

(c) *This jurisdiction of a state over shareholders in its corporations has been affirmed by this court.*

In *Jellnick v. Huron Co.*, 177 U. S. 1 (1900) this Court had occasion to inquire into the nature of shares of stock in a Michigan corporation, and enforced the laws of that state, making shares of stock personal property within the state of Michigan. The existence of a transfer office outside of Michigan was immaterial.

> "The habitation or domicile of the company is and must be in the state that created it. The property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is whenever it is sought by suit to determine who is its real owner."

In *Tappan v. Merchant's National Bank*, 19 Wall. 490 (1874) this Court in passing on the power of taxation of shares of stock in a national bank, said,—

> "Every owner takes the property (shares of stock) subject to this power of taxation under state authority, and every non-resident by becoming an owner voluntarily submits himself to the jurisdiction of the state in which the bank is established for all purposes of taxation on account of his ownership. * * * * * The shareholder is protected in his person by the government at the place where he resides, but his property in this stock is protected at the place where the bank transacts its business."

In *Glen v. Liggett*, 135 U. S. 533 (1890) this Court expressly held that the laws of Virginia define the rights of a non-resident stockholder in a Virginia corporation.

(*d*) *The Maine Statutes exercise this jurisdiction.*

Even a cursory examination of the provisions of law relating to Maine corporations, found in Chapter 51 of the Revised Statutes of Maine of 1916 (Revision of 1930, c. 56), shows that the Legislature of Maine has exercised the jurisdiction of a state over its corporations. The Legislature has defined and delimited with exactitude what a Maine corporation is, and its relations to its stockholders and the world. Some of these provisions are summarized by the Supreme Judicial Court of Maine in its opinion in the present case. (*Record*, p. 19-20).

For instance, stock in a Maine corporation cannot be validly transferred except on the books of the corporation; the corporation cannot sell out its assets over the objection of a minority stockholder; and dissolution proceedings must be brought in the equity courts of Maine. These provisions are obviously of much more moment than the mere registration of a bond; they amount to much more than the mere recording of a transfer of property. Bonds registered in Maine cannot be fully transferred without an act done in Maine; but that is all Maine has to do about it. In the case of stocks, there are other antecedent, coincident and subsequent conditions provided by the law of Maine.

II.

"Business Situs"

Our argument up to this point carries us to the point of affirming the right of the State of Maine to regulate and tax the interests and transfers of shareholders in a Maine corporation even when the corporation has no connection with the state except by incorporation. It is, however, the fact that in the present case the Great Northern Paper Company is in a much more real sense a Maine corporation. It is not only incorporated here, but its property and mills are located here. In this case we do not need to limit ourself to the case of a corporation, merely incorporated or merely having a transfer office in the state.

There is no claim whatever that the certificates of stock themselves had a "business situs" in Maine. It is conceded that they were kept by the owner in Massachusetts at the time of his death. Our point is, however, that Maine is where the corporation "carries on," and to that extent the corporation may be said in some degree at least to have had a "business situs" in Maine.

These facts alone might not entitle Maine to levy an inheritance tax on non-resident share transfers.

See *Rhode Island H. T. Co. v. Doughton*, above cited.

But these facts may indicate that the corporation as distinguished, of course, from the mere certificates of its stock, has a "business situs" in Maine. The effect of a "business situs" has been specially referred to in the recent Supreme Court cases.

In the *Farmers Loan & Trust* case the majority opinion left for future consideration the question of inheritance taxation of a decedent's interest in a business in another state carried on as a unit.

In the *Beidler* case the state court ruled that the corporation had a business situs in South Carolina, but this Court failed to find the conclusion justified by the record.

It is submitted that these cases indicate that this Court in a proper case will rule in favor of taxation at the place of the situs of a business, of the transfer of a non-resident's ownership therein, in analogy with the property tax cases under the Louisiana law.

New Orleans v. Stempel, 175 U. S. 309 (1899)
Bristol v. Washington County, 177 U. S. 133 (1900)
State Board v. Comptoir, 191 U. S. 388 (1903)
Metropolitan Life v. New Orleans, 205 U. S. 395 (1907)
Liverpool etc. Co. v. New Orleans, 221 U. S. 346 (1911)

Whether in such case the Court should limit the taxation to the state of the business situs, or will also permit the state of the owner's domicile to tax, is not of importance in the present case, if the doctrine is established that at least the state of the business situs may tax, and if Maine is the state of the business situs.

The only recent case to discuss the point further is *Hill v. Carter*, 47 Fed. (2nd) 869; (C. C. A. 9th Circuit, March 9, 1931), where the court held that certain intangible property had acquired a business situs in the State of New York such that income from it was not subject to a Hawaiian income tax. The Court relied upon *Deganay v. Lederer*, 250 U. S. 376 (1919) which held taxable in the United States income from securities, including corporation stocks held and managed for a non-resident alien by an agent in this country.

Because of the distinction between debtor-creditor obligations and shares of stock, of which we shall speak later, it is not necessary in the present case to base the contention of the State of Maine on the theory of business situs, and the Supreme Court of Maine in its opinion from which appeal is taken, did not take the point. It is, however, submitted that there is sufficient in the record from which this Court can conclude

that the Great Northern Paper Company, with its property and plant substantially located in Maine, was a business operation conducted in this state. As such, the interest of its stockholder which Maine seeks to tax is, as a matter of degree at least, something in which Maine has a very real interest, and to which it is giving a very real protection, and a definite reason for dismissing the present appeal is thereby furnished.

III.

The recent Supreme Court cases do not necessarily deprive the State of Maine of its right to an inheritance tax on this transfer.

In none of these three recent cases were corporate shares involved; except by way of the executor's conceding South Carolina's right to tax them in the *Beidler* case. These cases deal with bonds, certificates of indebtedness, notes, bank deposits,—in short, *debtor-creditor obligations*; not as our case must, with shares in a corporation whose property and mills are substantially located in the incorporating state.

The difference between debtor-creditor obligations and corporate shares is more than a question of degree. The debtor and his creditor are involved in no such complex of rights and obligations as are the stockholder and his corporation. A debt in the hands of the creditor is intangible property, and it is also a chose in action; and if it is evidenced by a bond or a note, it is a negotiable security. It is nothing, however, more or less than a debt to the creditor. By holding it he does not enter into a definite status.

A shareholder does. He has a right to share in the management, profits and ultimate assets of his corporation. As expressed in 14 C. J. 318,—

> "A share of stock is not like a note a chose in action, but it is analogous to and in the nature of a chose in action, and has repeatedly been so classified."

A debt is simply money owing to a creditor. The creditor may transfer his right to receive the money wherever he is, and the debtor has no interest in the transfer, and, in the case of promissory notes and bonds, frequently has no knowledge whatever as to whom the debt is payable until it is demanded by the final owner. The creditor has no voice in anything the debtor may do except as it may in some manner defeat payment of the debt or diminish security if security is given. On the other hand, a stockholder in a corporation has so many rights that we will not attempt to enumerate all of them, but only will recall to the Court a few for the purpose of illustration, viz.: he may participate in the earnings of a corporation; he may vote in the election of directors to manage its affairs; he may consent or refuse to the closing up of the corporation and winding up of its affairs; and may participate in the distribution of its assets.

If the stockholder wishes to vote his share of stock in the Company, it is necessary for him or his executor to come to Maine, in person or by proxy, to do so. When the stockholder acquired his stock in the Company, he took the stock impressed with laws concerning corporations or corporate stock in existence in Maine at the time, and also subject to any law passed in the future regulating or affecting corporations, even though such laws be in the general laws of the state.

We submit that this Court may take these differences in the nature of the obligations as a reason for withholding an extension to this case of the doctrine that the domiciliary state has the exclusive right to tax.

IV.

If practicable, both the state of the incorporation and the state of the domicile should retain the right to an inheritance tax on this transfer.

We concede the jurisdiction of the domicile to tax the inheritance of shares of stock just as we believe that our opponents must concede the force of our citations as to the similar

power hitherto exercised by the state of incorporation. While both sides recognize the evils of double taxation, the chief difference between us is whether this evil is to be remedied by the complete surrender by the incorporating state of its right to tax.

We believe another remedy is practicable; but before considering it, let us mention three reasons for preserving if possible the right of both states to tax.

(*a*) *To avoid overruling cases.*

If both states can tax, many cases can stand unmodified which must be reversed if the court is to rule that the incorporating state must lose its tax right to the domiciliary state. So far in deciding the *Farmers Loan & Trust,—Baldwin* and *Beidler* cases, this Court has expressly overruled but one case,—*Blackstone v. Miller*, 188 U. S. 189 (1903). It has apparently by necessary implication overruled but one other, viz.—*Wheeler v. Sohmer*, 233 U. S. 434 (1913), which permits inheritance taxation of certain non-resident debtor-creditor securities at the place of deposit of the instruments.

If, however, the Court rules out the right of Maine to tax this transfer, as a corollary must naturally follow the overruling of the many cases already referred to which vest a state with this very power, and along with them, by necessary implication from the Court's adoption of a single form of solution for the double taxation problem, the cases already cited under the general property tax which vest the incorporating state with the power to tax the shareholders in its corporations, and the cases permitting the state of the business situs to tax business credits; and also the cases which permit double taxation of several other forms of property interests.

To stigmatize the double taxation of debtor-creditor securities under the inheritance tax merely extends to these securities principles already outlined for their taxation under the general property tax.

Under that tax, bonds have been held untaxable in the debtor's state, even when the bonds are secured by mortgage in the debtor's state; but the creditor's state can tax them.

State Tax on Foreign Held Bonds, 15 Wall. 300 (1873)
Kirtland v. Hotchkiss, 100 U. S. 491 (1879)

Mere temporary presence of commercial paper does not make it taxable.

Buck v. Beach, 206 U. S. 392 (1907)

Even bonds exempt from taxation where created may be taxed to the owner at his domicile, and a taxing state may discriminate against non-resident securities in taxing its resident.

Bonaparte v. Appeal Tax Court, 104 U. S. 592 (1881)
Kidd v. Alabama, 188 U. S. 730 (1902)

But double taxation of other property interests has been upheld. Within the same jurisdiction, at least, and in some instances between several jurisdictions, the Fourteenth Amendment does not prevent it.

Fort Smith Co. v. Arkansas, 251 U. S. 532 (1920),—permitting a state to tax its corporations for their stock in other domestic corporations, although individual shareholders are exempt.

Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920),—permitting a state to tax its corporations on the value of their stock, including property and business located elsewhere;—the corporation's "good-will" may apparently be taxed twice over in different states, once to the corporation and once to the stockholder.

Swiss Oil Co. v. Shanks, 273 U. S. 407 (1927),—permitting tax on oil as property and also on its production.

Hellmich v. Hellman, 276 U. S. 233 (1928),—permitting certain double taxation under the Income Tax law.

And see,—*Maxwell v. Bugbee*, 250 U. S. 525 (1919) where New Jersey was permitted to include the value of property outside New Jersey in computing the New Jersey inheritance tax upon a non-resident estate.

Taxation to two persons under the general property tax of the value supported by a single economic interest has been approved. The mortgagor and mortgagee may each be taxed for his ownership of the mortgaged property, even when the two interests are held in different states.

Paddell v. New York, 211 U. S. 446 (1908)
Welch v. Boston, 231 Mass. 155 (1915)
Hunt v. Perry, 165 Mass. 287 (1896)

Stock exchange seats may be taxed both where the exchange is located and also at the owner's domicile.

Rogers v. Hennepin Co., 240 U. S. 184 (1916)
Citizens Bank v. Durr, 257 U. S. 99 (1921)

A resident vendor's interest under a contract relating to foreign realty has been held taxable, and also a non-resident vendor's interest under such a contract affecting realty in the taxing state.

Rogers Estate, 149 Mich. 305 (1907)
State v. Probate Court, 145 Minn. 155 (1920)

From these cases it will be seen that a certain amount of double taxation has always been approved by the courts. Our suggestion is that the Court should recognize this condition, modifying the law as may be necessary, so as to protect the taxpayer, without going the length of cancelling all these cases by pushing a new theory to its limit.

Some double taxation has been invalidated by the recent cases,—but must all of it go? We say,—the other possibilities should be canvassed.

(*b*) *To accomplish a desirable object as a matter of principle.*

As a matter of principle both states should have the right to tax, whether or not as a matter of public policy they exercise the right.

The exercise by any state of a right of taxation which it may legally possess, is of course a matter of public policy for that state. For instance, like Alabama and Nevada, it may decide against any inheritance taxation. Like Florida, it may decide upon a limited estate tax law. As was formerly the case in Maine, it may decide upon a tax upon collateral inheritances, and not upon direct inheritances. It may decide to extend complete reciprocation to other states with reference to all intangible personal property by exempting the inhabitants of those states from taxation on intangible interests within the taxing state. As a matter of fact, this has become the policy of the State of Maine by statute passed since the death of Mr. Haskell. These are instances of what we conceive to be the proper exercise by the several states of their taxing power in accordance with their several views on public policy,—a general right which this court has not questioned.

The recent Supreme Court cases are a judicial determination in favor of complete reciprocation between all the states in the case of debtor-creditor obligations. This Court feels that constitutional provisions prevent the several states from taking differing views as to their local public policy on this particular point.

In the case of corporation shares, however, which have not yet been passed upon by this Court, there are definite reasons why the state of the incorporation and the state of the domicile should be left free to exact a death tax on the transfer if the states desire to do so, and if the taxpayer can be protected from unconscionable exaction. Take the cases of Maine and Massachusetts with reference to the transfer of this stock in the Great Northern Paper Company. Each state has a definite reason for taxing it. Maine incorporated and protects the corporation, and aids the shareholder to effectuate and transfer his ownership; Massachusetts protected the individual

shareholder, and aids in the settlement of his estate. Each reason is good,—each has been approved by the courts, we have seen. For either state to lose the tax would be indeed to yield to an unfortunate necessity.

The only reason for concentrating in the domiciliary jurisdiction the inheritance taxation of debtor-creditor obligations is the double taxation which otherwise occurs under complex modern conditions. The protection of the right of a state to regulate and tax its own corporations is, however, of such peculiar importance under the decisions which we have cited above as to give pause to the suggestion of overturning it merely for the sake of avoiding another evil. This may be equally true of any suggestion that the domiciliary state wholly yield to the state of incorporation. Is there any other way out? We think the record in the present case points the way, as we shall later discuss.

If one of these states is to yield, the avoidance of double taxation is the reason. Until the recent cases, if then, it has not been held that double taxation is so clearly wrong that one taxing jurisdiction must entirely yield to another. The theory has merely been, as the Court says in the *Farmers Loan* case, that "the right of one state to tax may depend somewhat upon the power of another so to do."

The leading case discussing the general principles is *Union Refrigerator &c Co. v. Kentucky*, 199 U. S. 194 (1905).

Strictly speaking, double taxation is paying twice over for the same measure of protection. Going back to fundamentals and starting with a state which wants money for public expenditures, and a citizen who has property, we naturally find the tendency on the part of the state to take it where it can get it, though multiple taxation pile upon the taxpayer, and on the part of the citizen to resist not only any payment, but particularly payments which impose a burden enevenly on him as compared with other persons. Taxation under any system of settled government has to be based on some principle other than the tyrannical principle of grabbing the money where it can be found.

In the case of property taxation two principles frequently come into conflict. The individual is protected where he lives, and his home government seeks to take from him taxes in proportion to his property stake. On the other hand, his property, not only tangible but also intangible, often exists under and is protected by various other jurisdictions.

The simplest case is real estate. There by long practice the doctrine has become established that only the jurisdiction which protects the property will take the tax. The owner may live in another community, and there have all the benefit of its laws without any contribution whatever to its maintenance, but that jurisdiction does not claim the right to tax him on his foreign real property, although by both income and excise taxes it may seek to get from him a contribution. Taxation of this real estate to the foreign owner has not been forbidden on the ground of double taxation, but on the ground that only in the place where it is situated does it exist as property under the protection of the laws. His income from it, received where he lives, may measure his tax obligation to his home state, but his ownership of the property itself is solely controlled by the state where it is situated and only that state should tax it.

The inheritance tax is a tax on a privilege, not on property; viz,—on the privilege of giving and getting, while a property tax is a tax on the right to a continued holding and owning of property. Death is the occasion for taking the toll known as the tax. For our purposes whether the tax is on the right of the deceased or on the right of the inheritor is immaterial. Without the protection of the law the transfer could not take place, and this privilege covers the whole transaction from the death of the deceased until the time when the property reaches its ultimate owner.

As a matter of theory, if this privilege requires the protection of the laws of several jurisdictions both should exact a tax. The double taxation is wrong not in theory but in practice. If the practice can be amended, the theory might stand unimpinged.

(c) *And as a matter of public policy.*

The practical reason for retaining taxation to some extent in both jurisdictions is well analyzed in the treatise prefixed to the Commerce Clearing House Inheritance Tax Service, Edition of 1928-30, where prior to the decision in the *Farmers Loan & Trust Company* case, the author in advocating the advisability of a qualified reciprocal clause, has this to say,—(C. C. H. February 5, 1929, p. 63).

> "It is indisputable that the operation of death tax laws based upon the theories of domicile and situs usually results in double and possible multiple burdens of taxation, borne as a class by the persons out of whose pockets the taxes come. It is equally indisputable that the operation of death tax laws upon either of these two theories alone results inevitably in loss of revenue to all the taxing states, and by the same token inevitably tends to result in *double avoidance of taxation* by the persons out of whose pockets the taxes should come and implies a break down of the death tax all around. Unqualified reciprocity is equally as dangerous to the revenue of the state as abstention from tax upon intangibles of non-residents. The only way out of the muddle is the adoption of a qualified reciprocal provision differing from the one heretofore recommended officially which will make certain that the taxpayer pay at most one tax either to the state of domicile or to the state of the situs, but does not permit of avoiding the death tax in both states."

Unless both states may tax there will be a complete escape from death duties in some estates of such size as to be within the scope of the state inheritance tax systems, though below the Federal estate tax minimum.

The nation as a whole will suffer. Methods of tax evasion will work when only one state has jurisdiction which will fail if two states can tax. An exemption of corporate shares in the state of incorporation where they can readily be located will put a premium on the concealment of assets in order to

escape taxation at the domicile. Moreover, contests over the domicile of the deceased person, always unsatisfactory, will remain as they are, of comparative infrequency, instead of bulking large in the courts.

As this Court has said, taxation is a practical matter, legal evasion is proper, but it is inconceivable that unless necessary for the sake of avoiding worse evils, this Court will give aid to those who seek to escape paying death duties.

The argument on policy and expediency should, of course, have no effect toward validating a tax fundamentally illegal, but may properly have force toward preserving an existing tax which is attacked because of its effect on the community.

The doctrine of the recent Supreme Court cases is based on a high degree of expediency,—viz, the prevention of double taxation under complex modern conditions. To offset that, we suggest other arguments from expediency which make for caution in extending the doctrine of those cases.

The prevailing opinion in the *Baldwin* case doubts the force of the argument that the property will escape taxation entirely unless it can be doubly taxed. This same point is made in the *Buck-Beach* case, as well as in the *Schlesinger* case in 270 U. S. p. 230 (1926), cited in the *Baldwin* case.

In the *Buck-Beach* case, however, the actual decision was that the property was not taxable, and the same is true in the *Schlesinger* case. In the *Buck-Beach* case the Court refused approval of a property tax on commercial paper temporarily within the taxing state for the purpose of escaping taxation in the home state. In the *Schlesinger* case the majority opinion refused approval of an inheritance tax on gifts within six years prior to the giver's death based on the conclusive presumption that these gifts were in contemplation of death. In both cases the tax was held fundamentally illegal. Mention of the practical considerations was, therefore, wholly dictum.

In the *Schlesinger* case moreover these practical considerations were referred to with reference to their effect in the Legislature and were not really for the Court.

In our case, however, we take the position that the tax imposed by Maine is a valid and legal tax under a long line of established cases. The tax will stand unless the preventing of double taxation under modern complicated circumstances requires giving up the tax as a matter of expediency and public policy. Our point is that practical considerations may properly be urged several ways; i. e., to argue for adequate tax revenue on a consistent theory and against over-emphasizing the dangers of double taxation from long established taxes, as well as to argue against the double taxation itself. As a matter of public policy it is our contention that some kind of tax outside of the domicile is required in order that the community may somewhere obtain a tax on estates of such size that they should be taxable under state but not under Federal laws.

So for the sake of "stare decisis" and for reasons both of principle and policy we submit that the State of Maine should be permitted to collect the tax in this case, regardless of the recent Supreme Court rulings in the *Farmers Loan & Trust, Baldwin* and *Beidler* cases.

V.

The Solution of the Problem of the Case

It is our contention that on the record in this case the problem of taxing these shares at the death of their owner can properly be solved just as it was by the taxing authorities of the two states concerned; i. e.,—by the collecting of a tax in each jurisdiction, Maine's tax carrying a credit for the Massachusetts tax. Section 4 of the Maine Act has operated in the case to give just the "qualified reciprocity" which the article in the C. C. H. quoted above advocates,—in short, *split* rather than *double* taxation.

In a nutshell,—the estate of a Maine resident would have had to pay Maine a $62,000 tax on this transfer,—this estate is asked to pay Maine less than half that sum, because more than half has been paid in Massachusetts.

We have urged the fundamental difference between corporate shares and debtor-creditor securities as a reason for warding off from corporate shares the application of the recent ruling made in the case of debts and credits. Granting this contention without more, this Court may feel that it may disregard entirely the Massachusetts aspect of the situation, and validate the present tax without anything more being said, making no comment on the rights of other persons who may in the future be taxed in Maine on their shares in Maine corporations prior to the fixing of a tax at their domicile.

But our belief is that the Court may properly go further, and validate the present tax on the express ground that the Maine tax has credited the Massachusetts tax.

Our contention that Maine may tax this transfer does not necessarily result either in the double taxation against which the rule is aimed, or in that complete loss of death tax income to either of the states which we have contended would be unfortunate. Our solution is that each state should tax, as it has done, one state with reference to the tax already paid in the other. The remedy for modern complexity in the case of shares of stock is not necessarily that either state yield entirely its right to a death tax. If this Court finds that the state whose tax is before it for action had yielded to the other state a portion of its own demand; i. e.,—has credited the amount of the other tax, then what occasion is there for this Court to interfere?

All this Court needs to do in this particular case is to rule that Maine has an ancient right to tax shareholders in its corporations on their property and transfers; that if that right is exercised in such a way as not to lead to a discrimination between residents and non-residents of Maine by a duplication of taxation on the non-resident estate at the full value on the transfer of the property, this Court has no reason for putting a brake on Maine's exercise of its right.

The "double taxation" which this Court has recently criticized is the complete duplication of taxes in two jurisdictions on the same transfer in the case of certain forms of security.

The majority of the Court in these three opinions considered the problem not from the point of view of the right of the taxing state to tax, but from the point of view of the taxpayer, and the Court solves his difficulties by requiring other states to yield completely to the state of the domicile in the case of these securities.

In other words, the Court says: the state where the instruments are kept or where the debtors live should lose out to the state of the domicile, because only one state should tax and the state of the domicile is the right one to do it. This involves the proposition whether there must necessarily be but one such state, before we reach the proposition which state.

The decisions in these recent cases, of course, solve the particular problem in those cases, and there that solution causes few new problems. The solution adopted seems to have been the only one considered by the Court as possible on the record in those cases if double taxation were to be avoided. There was apparently no possibility of a deduction by one state for taxes paid in the other. If the contested tax were allowed the tax was equivalent in each jurisdiction. It was all or nothing in each of the two states.

Now if we assume that this Court would have decided any or all of the three recent cases just as it did, had the Court been ruling upon a partial or split tax, our contention is that shares of stock are sufficiently different in kind from the securities there considered so that this Court should not extend the doctrine of those cases to shares of stock. *A fortiori* the way is open to the decision for which we contend in the present case if we assume that this Court would have decided those cases differently had its attention been directed to a split tax.

How does the situation differ in those cases from this? The Court goes on the basis that the domiciliary state had exacted full inheritance tax, without any attention to the possibility of a tax in the second state, and that the second state in turn was seeking to duplicate the payment without regard to the tax already paid in the domiciliary state,—exactly *double* taxation. But suppose the domiciliary state had awaited the outcome of the tax in the other state, and the tax in that other

state, first assessed in point of time, had come up for attention in this Court before the domiciliary state acted. Must this Court disapprove the tax simply on the ground that a second tax in the domiciliary state was *impending?* And suppose the tax in such other state had been paid, and the domiciliary state then sought to establish a tax for the difference between its own rate and the amount thus paid,—must this Court therefore disapprove the exaction?

We have in the present case still another situation,—the domiciliary state has gone ahead and exacted its tax; the other state seeks to collect the difference between that tax and the full tax that would be asked from a resident estate or a non-resident estate of a state not imposing a death duty. Must this Court disapprove this tax, even in the case of debtor-creditor securities,—*a fortiori* in the case of corporation shares?

We urge that it should not.

It was suggested in the majority opinion in the *Farmers Loan* case that one state's power to tax may depend somewhat on the power of another state. Of the citations *So. Pac. Co. v. Kennedy*, 222 U. S. 63 (1911) permits Kentucky to tax steamers of the Southern Pacific under the property tax, at the domicile of the corporation, and rules that enrolment at New York was immaterial, there being no permanent actual situs of the vessels at New York. The Court indicates that the vessels would not be taxable at Kentucky if actually located elsewhere,—a holding which was subsequently affirmed with respect to inheritance taxation in the *Frick* case. The Court was not concerned primarily with the power of New York to tax, but with the concrete question where the vessels were located. If located permanently in New York they could not be technically located in Kentucky; otherwise, they could. The case does not go far in valuing the effect of one state's tax on another state's right to tax, but certainly shows that it is a consideration to be considered by the Court.

Coe v. Errol affirms, as this Court has said,—

> "The rather obvious proposition that the mere fact of taxation of tangibles by one state is not enough to exclude the right of another to tax them."

Granting this major premise, our suggestion is that a different minor premise is called for in the present case from the contention of the estate for a complete escape from taxation in Maine. If Maine credits the Massachusetts tax, why doesn't that make Maine's tax "depend somewhat upon" Massachusetts?

Just how in fact, and as a matter of dollars and cents, the tax should be split, is, it seems to us, not for this Court to determine. In the absence of any showing of discrimination or confiscation this Court is not concerned with the proportion between tax exacted and benefit received which the estate mentions in its pleadings.

So also with the order in point of time in which the two taxes were assessed. It may be that logically the tax in Maine comes first in order; the amount of the tax in Massachusetts comes next. Just how it happened that in this particular case the estate settled its Massachusetts tax first and then used it as a credit in Maine, instead of settling in Maine and seeking credit in Massachusetts, is not clear on the record. It seems to us that these are matters of detail and administration not within the purview of the Court on this record. Our point is that this Court should affirm the judgment because on the record it can see that the proper general principle has been observed; viz,—a tax in Maine on a transfer taxable in Maine; without double taxation of the same interest, transfer and property, because credit has been duly given by Maine for the tax paid in Massachusetts.

While our contention is, as we have said, not inconsistent with the views of the majority of the Court as set forth in the opinions in the recent Supreme Court cases, it is obviously also not inconsistent with the views of the minority. They approach the problem from the point of view of the taxing jurisdiction and not from the point of view of the taxpayer's liability for the payment of more than one tax. They ask: Has the taxing state something it can tax? They do not ask: If the taxing state does tax this transfer, what is going to happen to the taxpayer? They follow *Coe v. Errol*, 116 U. S. 517 (1886)

which disregards the possible taxation of logs to their Maine owner as having any bearing on the validity of a New Hampshire tax on the logs while there located.

According to the minority, therefore, the concern of this Court is not with the Massachusetts but with the Maine tax; if the Maine tax stands on a valid basis, the Court need go no further. That it so stands, of course, our first premise. In the *Farmers Loan & Trust Co.* case the minority disagreed as to the degree, if any, of protection accorded by Minnesota to the securities, and hence as to the power of Minnesota to tax. In the *Baldwin* case they agreed that Missouri extended sufficient protection to justify it in taxing. In the present case, Maine's jurisdiction over its own corporation can hardly be disputed.

Affirming the Maine tax in this case therefore will neither run counter to the views of the majority nor the minority in the recent Supreme Court cases, and will exact from the estate a reasonable tax on proper principles for the benefit of both states.

C.

CONCLUSION.

On the record in this case it appears that the State of Maine originally made the effort to figure an inheritance tax on the transfer of shares of stock in the Great Northern Paper Company, a Maine corporation, owned at his death by a citizen of Massachusetts, in the sum of some $62,000 which disregarded the fact that the estate had already paid an inheritance tax of some $32,000 on the same transfer in Massachusetts. As a result of previous litigation this Massachusetts tax was credited, and a probate judgment decree for the net amount, some $30,000, entered up. We submit that the mandate of the Supreme Judicial Court of Maine entering up judgment for this tax should be affirmed, and this appeal dismissed because the tax levied in Maine is justified in principle as a tax on the transfer of an interest in a corporation created by and under the jurisdiction of Maine, which has substantially all its property located in that state. We therefore submit that the dangers of double taxation which led this Court in three recent cases to rule against the death taxation of debtor-creditor securities outside the creditor's domicile, should not induce this Court to set aside the tax, because there is a substantial difference in the kind of property here transferred; and because from affirming this tax will result not double but split taxation; viz,—the payment of a tax in Maine which takes account of and credits the tax already paid in Massachusetts.

December 1, 1931.

Respectfully submitted,

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REPLY BRIEF

1. There can be no doubt but that the tax in question is an excise tax on the devolution of property from the dead to the living, as the Estate claims in its brief, but prohibiting the tax on this theory does not invalidate the excise imposed by Maine. The devolution takes place in both states. By common consent among common law jurisdictions the laws of the domicile control in the final disposition of personal property wherever located. But property within the jurisdiction of the State of Maine and belonging to a Massachusetts decedent, whether it be real estate, tangible personalty or intangibles, passes from him at his death by virtue of the operation of the laws of Maine as well as of Massachusetts. The right of the State of Maine to exercise jurisdiction over its corporations and their shareholders by taxation, as in other respects, can hardly be seriously disputed on the cases, and there can be no doubt but that the State of Maine has hitherto exercised this jurisdiction without question not only in other respects but also by the taxation of the shares in its corporations under its inheritance tax on the death of their owners.

2. The State of Maine bases its power to collect the tax upon the operation not merely of the Maine statutes relative to stock transfers, but also of the Maine statutes which evidence and exercise the jurisdiction of the State over the complicated relationship known to the law as corporation and shareholders. This jurisdiction is by no means attenuated. It is concerned with much more than the mere fact that the transfer of stocks in Maine corporations can only be completely affected by an act effective under the laws of Maine.

3. The distinction between the *Farmers Loan*, *Baldwin* and *Beidler* cases, on the one hand and the present case on the other is the differing state of circumstances in those and this case. It is not a question of applying the same rule to identical circumstances. This is evidenced not only by the very fact that this case is before the Supreme Court at all, but also by the differing decisions which have been given by state courts

since the recent Supreme Court cases were decided, and by the great amount of public interest taken in the controversy which the present case brings before this Court.

4. As to the suggestion on Pages 22 and 23 of the brief for the Estate illustrating a point by reference to the Boston and Maine Railroad, two answers have been suggested to us by the Attorney General of Minnesota:

> (a). The matter of incorporating in more than one state is in the control of the incorporators. If they choose for convenience to form corporations in several states they should not be allowed to say that the exercise of the power of taxation by each of those states is unfair and inequitable, as it is a situation which they have brought upon themselves.
>
> (b). The legal effect of such a situation is that there are four separate and distinct corporate entities, not one corporation functioning in four states. Each of the four states has chartered a separate corporation, notwithstanding the fact that the same individuals may be the incorporators and stockholders in each of the four corporations.

5. The Legislature of the State of Maine has apparently not felt that it needed expressly to fix the situs of stock in Maine corporations within the State of Maine for the purpose of providing for the succession tax, because the right of the State to enforce this tax has never been questioned. As we have already said, it is not necessary that the tax should be defended simply on the basis of a situs in the sense that here is where the transfer of stock is recorded.

6. The last four lines on Page 30 of the brief are significant in view of the solution of the problem of the case which was adopted in the case itself and for which the State's brief argues on general principles. If, as the Estate's brief suggests, "The Executor had no choice except to pay the inheritance tax in Massachusetts," is not justice accomplished, when later the State of Maine credits the amount of that tax upon its own tax?

7. We certainly doubt the statement on the 31st page of the Estate's brief that, "The occurrence of a single transfer of property in more than one state is an impossibility." If the decedent lives in one place and his property is in another, the two states may agree or disagree as to the incidents of its transfer at his death. If one state yields to the other it is on reasons of comity and not in denial of the fact that property here located has been here transferred.

8. To summarize our position in two sentences: the Estate argues two points,—First, that Maine has no right to tax the transfer of this property, and secondly that the circumstances are substantially the same in this as in the recent Supreme Court cases. Both these contentions we have attempted in our brief to meet and deny and in addition, we suggest that the outcome which we seek in the particular case works out justice and illustrates a principle which this Court can properly approve.

Dated December 3, 1931.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, EXECUTOR OF THE ESTATE OF EDWARD H. HASKELL, DECEASED,

Appellant,

vs.

STATE OF MAINE,

Appellee.

BRIEF FOR THE STATE OF MINNESOTA AS AMICUS CURIAE.

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INDEX.

	Page
Statement of the case	2
Summary of argument	2
Question presented	4
The Law	4
I. This Court has clearly committed itself in favor of the right of the state of the corporation's domicile to levy an inheritance tax on the transfer by death of shares of stock therein owned by non-residents	6
II. This Court should not commit itself to any rule limiting to a single state the right to levy a succession tax on the transfer of shares of stock in a corporation	9
III. Before property can join in a universal succession it must pay a tax to the singular succession	20
IV. The real subject of this tax is the shifting of economic benefits and burdens of property from the dead to the living	21
Conclusion	22

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Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325 13
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Appellant,

vs.

STATE OF MAINE,

Appellee.

Motion for Leave to File Brief as Amicus Curiae.

May it please the Court:

The undersigned, as counsel for the State of Minnesota, respectfully move this Honorable Court for leave to file the accompanying brief in this action as *amicus curiae.*

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JOHN F. BONNER,
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FIRST NATIONAL BANK OF BOSTON, EXECUTOR OF THE ESTATE OF EDWARD H. HASKELL, DECEASED, *Appellant*,

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Appellee.

STATEMENT OF THE CASE.

From the agreed facts it appears that Edward H. Haskell died testate, a resident of Massachusetts, January 8, 1924. At his death he owned stock in the Great Northern Paper Company, a corporation organized and existing under the laws of the State of Maine. His will was probated in Massachusetts, which levied and collected a transfer tax on legacies and distributive shares, made up in greater part of the proceeds of said stock. The State of Maine claimed a tax on the transfer of his shares of stock in the Great Northern Paper Company, which tax, after deducting therefrom the amount paid the State of Massachusetts, amounted to $30,139.88 (R. 5-7). Substantially all of the Great Northern Paper Company's property, including its real estate and mills, are located in Maine (R. 10).

SUMMARY OF ARGUMENT.

1. Minnesota has a substantial pecuniary interest in the question presented in this case.

2. This court in an unbroken line of cases has held that jurisdiction to levy a succession tax on the transfer of shares of stock owned by a resident of one state in a corporation organized and owning property in another, inheres in the state of the domicile of the corporation.

3. Jurisdiction to impose a succession tax also exists at the domicile of the decedent.

4. Both the state of the domicile of the corporation and the state of the domicile of the owner should be permitted to levy a succession tax on the transfer of corporate stock.

5. An observance of the doctrine of *stare decisis* precludes this court from limiting the right to levy a succession tax on a transfer of shares of stock owned by a resident of one state in a corporation organized and owning property in another at the domicile of the decedent.

6. The nature and character of a shareholder's interest in a corporation makes impossible the adoption of any rule of single situs of corporate shares for purposes of taxation.

7. No provision of the constitution of the United States is violated by requiring shares of stock to pay a tax in the state of the singular succession before the interest represented by such shares of stock can join the universal succession.

8. The shifting of the economic burdens and benefits of property which is the subject of the succession tax may occur in as many states as have jurisdiction over the property.

9. The tax paid the state of the domicile of the corporation should be deducted from the value of the stock on which the tax to be paid the state of the domicile of the owner is imposed.

QUESTION PRESENTED.

The State of Minnesota is interested solely in the question whether a statute imposing an inheritance tax on the transfer of shares of stock owned by a non-resident in a corporation created by the taxing state and owning property and doing business within that state violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

THE LAW.

The Minnesota statute authorizing the imposition of this tax is identical in effect with the statutes of the State of Maine involved in the case at bar. Our statute is as follows:

Section 2292, *Mason's Minnesota Statutes of 1927*, provides:

> "A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, * * * to any person, association, corporation * * * in the following cases:
>
> * * * * * * * * * *
>
> "(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a non-resident of the state at the time of his death."

Section 2302, in part, provides:

> "No corporation organized under the laws of the State of Minnesota shall transfer on its books any shares of its capital stock standing in the name of a non-resident decedent or in trust for a non-resident decedent, without the consent of the attorney general first procured as hereinbefore provided for. Any cor-

poration violating the provisions of this section shall be liable to the state for the amount of any tax due to the state on a transfer of any such shares of stock. * * *"

Statutes similar in import and intent were enacted in 1905 (Sections 1 and 11, Chapter 288, Laws 1905). They were enacted in their present form in 1911 (Section 1, Chapter 372, and Chapter 209, Laws 1911).

Under and pursuant to the terms thereof Minnesota has collected inheritance taxes for more than twenty-five years on the transfer of stock owned by non-residents in Minnesota corporations.

In *State ex rel. Graff vs. Probate Court,* 128 Minn. 371 (decided in 1915), *State ex rel. Bodman vs. Probate Court,* 142 Minn. 415 (decided in 1919), and *In Re Lund Estate* (not yet officially reported, decided in 1931), 236 N. W. 626, the Supreme Court of this state upheld the state's right to tax as against the objection raised that such taxation violated the due process clause of the Constitution of the United States.

During the two years last past Minnesota has collected from the estates of non-residents owning property therein $252,517.06, of which ninety-five per cent has been derived from the transfer of stock owned by non-residents in Minnesota corporations.

There is now pending before the Supreme Court of Minnesota a case involving a tax of $243,000 levied by that state on the transfer by death of shares of stock owned by a non-resident in the Great Northern Railway Company, a Minnesota corporation.

Minnesota, therefore, has a substantial pecuniary interest in the controversy involved in the case at bar.

I.

This Court Has Clearly Committed Itself in Favor of the Right of the State of the Corporation's Domicile to Levy an Inheritance Tax on the Transfer by Death of Shares of Stock Therein Owned by Non-Residents.

In an unbroken line of decisions this court has held that the state of the corporation's domicile, consistently with the due process clause of the Fourteenth Amendment, may levy an inheritance tax on the transfer by death of shares of stock owned by a non-resident in a domestic corporation.

Rhode Island Trust Co. vs. Doughton, 270 U. S. 69.
Frick vs. Pennsylvania, 268 U. S. 473.
Baker vs. Baker, Eccles & Co., 242 U. S. 394.

Similarly, this court has held that a property tax may be levied by the state of the domicile of the corporation on shares of stock therein owned by a non-resident.

Corry vs. Baltimore, 196 U. S. 466.
Rogers vs. Hennepin County, 240 U. S. 184.
Travelers Ins. Co. vs. Connecticut, 185 U. S. 364.
Tappan vs. Merchants Nat'l Bank, 19 Wall. 490.

These decisions are based upon the principle that the interest of a shareholder is a property interest, localized within the state of the corporation's domicile. This interest constitutes a species of tangible property different from an ordinary debt or one evidenced by a bond.

In Re Bronson, 150 N. Y. 1, in which the court say (page 8):

> "The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards

the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. * * * Each share represents a distinct interest in the whole of the corporate property. * * * The attempt to tax a debt of the corporation to a non-resident of the state, as being property within the state, is one thing, and the imposition of a tax upon the transfer of any interest in or right to the corporate property itself is another thing. The corporation is the creation of state laws, and those who become its members, as shareholders, are subject to the operation of those laws, with respect to any limitation upon their property rights, and with respect to the right to assess their property interests for purposes of taxation."

It is an interest distinct from the interest of a creditor in a corporation.

Beidler vs. South Carolina, 282 U. S. 1 (9).

In *Rhode Island Trust Company vs. Doughton, supra* (page 82), it is said that the shareholder's interest is

"* * * a distinct independent interest or property, held by the shareholder like any other property that may belong to him."

Questions relating to shares of stock are to be determined by the laws of the state of the corporation.

Story Conflict of Laws (8th Ed.), Section 583.

Black vs. Zacharie & Co., 3 How. 483.

The rights of a Massachusetts stockholder in a Virginia corporation must be determined by the laws of Virginia.

Glenn vs. Liggett, 135 U. S. 533.

The state cases holding in favor of the right of the state of the domicile of the corporation to tax transfers by death of shares of stock therein owned by a non-resident are collected and arranged in alphabetical order in note to *McLaughlin vs. Cluff*, 42 A. L. R. 347, on pages 365-366.

A reference to the cases collected therein disclose that fifteen states have decided in favor of the right of the state of the domicile of the corporation to tax under circumstances similar to those presented by the case at bar. So far as we are advised, no state court of last resort has held to the contrary.

Shares of stock thus owned may be said to have a business situs within the state of the corporation's domicile and thus become integral parts of some local business, within the doctrine of the cases of *New Orleans vs. Stempel*, 175 U. S. 309; *Bristol vs. Washington County*, 177 U. S. 133; *Liverpool & L. & G. Ins. Co. vs. Orleans Assessors*, 221 U. S. 346.

The legal presumption is that the state where the corporation is organized is the state of its principal place of business. It is true that to evade taxes and for other purposes corporations are frequently organized in states where very little of their business is transacted. Where the stockholders, for some such purpose, have organized in such a state, it does not lie in their mouths to deny this business situs or to question the jurisdiction of that state to tax corporate shares or their transfer.

If they have such a business situs, there is no question as to the right of that state to tax. The only inquiry re-

maining would be "whether such securities can be taxed a second time at the owner's domicile."

Farmers Loan and Trust Co. vs. Minnesota, 280 U. S. 204, 213.

Although at the time of writing this brief we do not have the benefit of the briefs of the parties to this appeal, and others who may file briefs as *amici curiae,* we assume that the foregoing decisions will be thoroughly and exhaustively discussed therein. We shall, therefore, not attempt a discussion of them.

II.

This Court Should Not Commit Itself to Any Rule Limiting to a Single State the Right to Levy a Succession Tax on the Transfer of Shares of Stock in a Corporation.

In many quarters the case of *Farmers Loan and Trust Company vs. Minnesota* has been cited as announcing the determination of this court to establish by arbitrary fiat, if necessary, the doctrine of the single situs of all forms of property for purposes of taxation. We do not believe this court intends such a construction to follow from the language used.

In declaring the single situs for purposes of taxation of real property and tangible personal property, this court was on solid ground, considered both from the standpoint of law and economics. When legal fictions were disregarded there could be little doubt as to the state having jurisdiction over such property.

In extending that doctrine to debts and choses in action by *Farmers Loan and Trust Company vs. Minnesota; Baldwin vs. Missouri,* 281 U. S. 586, and *Beidler vs. South Caro-*

lina, 282 U. S. 1, while the problem presented was more difficult of solution than in the case of tangibles, the court could still be reasonably sure of the legal and economic soundness of its conclusion.

But if it is attempted to extend that principle to corporate stock, the court must, because of the inherent difficulty in determining the real nature of the economic interest represented by that stock, leave solid ground and proceed solely by arbitrary rule. No one can lay down any rule of single taxable situs of corporate stock which from either the legal or economic standpoint is universally or even generally sound. The question is too complex—the difficulties too great.

A New York resident may own an iron mine in Minnesota. If he dies it is clear that the transfer of it would be subject to a tax by Minnesota, and not by New York. To avoid that, he may organize a Minnesota corporation in which he holds all the stock, and transfer the mine to that corporation. Under appellant's contention, by that single act, not of the state, but of the taxpayer, he has reversed the situation, taken away from Minnesota and given to New York the right to tax the transfer. There has been no change whatever in the real situation from the standpoint of economics. The property—the economic interest transferred—is still protected by Minnesota and within its jurisdiction.

This illustration is not offered in justification of the right of the state of the corporation's domicile to tax in all cases, because, of course, the owner of the iron mine might have organized a New Jersey or Florida corporation. But it does show that in a very real sense the interest of the shareholder is not a chose in action but an interest in the corporation and its property, and that an attempt to establish

a single situs must of necessity rest on legal fictions and be established by arbitrary rule. No such rule can operate fairly as between the states. The "good relations between the states" referred to in the passage from the Federalist, quoted in *Farmers Loan and Trust Company vs. Minnesota*, cannot be promoted by it.

The opinion in that case refers to the fact that two-thirds of the states have adopted reciprocal exemption statutes. We respectfully submit that the question of the advisability of adopting such statutes is a legislative one and if the states cannot agree the result can only be effected by a constitutional amendment. * We do not believe that the language of the Fourteenth Amendment requires such a policy on the part of the states.

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* The practical difficulty standing in the way of universal reciprocal tax exemption legislation as applied to inheritance taxation of intangibles is pointed out by Edwin R. A. Seligman, McVickar Professor of Political Economy in Columbia University in Essays in Taxation, Tenth Edition, 1925, page 123, as follows:

> "The committee (National Tax Association) recommended the adoption of the simple rule that the tax should be imposed, in the case of residents, upon all their intangible property and upon such tangible property as was within the state; but that in the case of non-residents the tax should be imposed only on the tangible property within the state. The New York law of 1911 followed this recommendation. The same principle was adopted by Massachusetts in 1912, and by some other Eastern states at about the same time. But the Western states were never reconciled to this method, and within a few years most of the Eastern states reverted to the old rule. Even had the principle prevailed, however, the possibility of double taxation would by no means have been eliminated. * * * Moreover, it is not very probable that the Western states which suffer from absentee ownership will agree to abandon the taxation of the securities of railroads owned in the East. As long as the present conditions continue it is most desirable that some interstate arrangement be effected whereby only such proportion of the securities be taxed as corresponds to the mileage or other criterion of property within the state."

In *Magoun vs. Illinois Trust and Savings Bank*, 170 U. S. 283 (293), it is said:

> "* * * the rule [referring to the equal protection clause of the Fourteenth Amendment] prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County vs. Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.'"

Taxation of property in more than one state may produce a hardship. But it is a situation which the taxpayer brings on himself by his method of doing business. State lines are very real things in our system of government, and, until the courts disregard them altogether, when a taxpayer's economic interests overlap them, he is bound to be in some difficulty. From a constitutional standpoint, the evils flowing from such difficulties are far less than those flowing from the arbitrary adoption of any single situs doctrine justified neither by law nor by economics.

Were it not for the language used by the court in *Farmers Loan and Trust Co. vs. Minnesota, supra*, concerning the economic inadvisibility of multiple taxation, it would not have occurred to anyone that the taxation of the transfer by death of shares of stock in a corporation domiciled in one state, owned by a resident of another, is contrary to the due process clause of the Fourteenth Amendment.

Theretofore, this court had held that the fact that two states, acting independently of one another, taxed the same property on transfer, furnished no ground upon which the taxpayer could attack the constitutionality of the tax as contrary to the due process clause of the Fourteenth Amendment.

Fort Smith Lumber Co. vs. Arkansas, 251 U. S. 532.
Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325.
Hellmich vs. Hellman, 276 U. S. 233.
Swiss Oil Co. vs. Shanks, 273 U. S. 407.
Rhode Island Trust Co. vs. Doughton, 270 U. S. 69.
Frick vs. Pennsylvania, 268 U. S. 473.
Maxwell vs. Bugbee, 250 U. S. 525.

In *Cream of Wheat Company vs. City of Grand Forks, supra,* this court had under consideration the constitutionality of the franchise tax levied by the state of North Dakota upon a corporation organized and existing by virtue of its laws. This tax was levied upon the privilege of being a corporation. All of its business was done outside of the state of North Dakota, and all of its property, tangible and intangible, was located outside of that state. The court say (page 328):

> "The contentions are that the Supreme Court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the Fourteenth Amendment. * * * The limitation imposed by the Fourteenth Amendment is merely that a state may not tax a resident for prop-

erty which has acquired a permanent situs beyond its boundaries. * * * Counsel for the company direct our attention to cases * * * which hold that a state may tax a foreign corporation not only on the value of its tangible property within the state but also on that proportion of its entire intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once and that it may be subjected to double taxation. *To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation.*" (Italics ours.)

In *Rhode Island Trust Co. vs. Doughton, supra*, this court in holding that North Carolina could not tax the devolution of shares of stock owned by a resident of Rhode Island in a New Jersey corporation, say (83):

"North Carolina cannot control the devolution of New Jersey shares. That is determined by the laws of Rhode Island where the decedent owner lived or by those of New Jersey, *because the shares have a situs in the state of incorporation.*" (Italics ours.)

In *Frick vs. Pennsylvania*, 268 U. S. 474 (497), the court say:

"The decedent owned many stocks in corporations of states, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those states the status of lienors in possession. As those states had created the corporations issuing the stocks, they had power to

impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that state it was essential that the tax be paid. The executors paid it out of moneys forming part of the estate in Pennsylvania and the stocks were thereby brought into the administration there. We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power. *Estate of Henry Miller,* 184 Cal. 674, 683. So much of the value as was required to release the superior claim of the other states was quite beyond Pennsylvania's control."

Unless the doctrine of *stare decisis* be entirely abrogated, the cases heretofore cited in this subdivision of this brief preclude this court from deciding that two states, having jurisdiction of the subject of the tax, may not exact a tax on the same transfer. The principle of *stare decisis* has many times been recognized by this court as a salutary principle of law.

New York Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495.

John Ii Estate, Limited, vs. Brown, 235 U. S. 342.

C. B. & Q. Ry. vs. United States, 220 U. S. 559.

Wright vs. Columbus, Hocking Valley & Athens Ry. Co., 176 U. S. 481.

Kidd; Dater and Price Co. vs. Musselman Grocer Co., 217 U. S. 461.

United States vs. Harvey Steel Co., 227 U. S. 165.

Marshall vs. B. & O. Ry. Co., 16 How. 314.

In *New York Life Insurance Co. vs. Deer Lodge County, supra* (502), it is said:

> "If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. *For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision.*" (Italics ours.)

> "* * * *Stare decisis* is a wholesome doctrine."
> *Vail vs. Arizona*, 207 U. S. 201.

In *Kidd, Dater and Price Co. vs. Musselman Grocer Co.*, 217 U. S. 461, quoting from the syllabus, it is said:

> "Where this court has held a state statute constitutional it will follow that decision in a case involving the constitutionality of a statute of another state which fundamentally is similar and which is attacked on the same ground by persons similarly situated."

The case at bar furnishes the strongest reasons for the application of this principle. Most of the states of the union have statutes permitting the taxation of shares of stock owned by non-residents in domestic corporations. The state of the domicile of the decedent has universally levied a tax on

this same transfer. Until the case of *Farmers Loan and Trust Company vs. Minnesota,* this court had firmly adhered to the principle that no constitutional barrier was raised against double taxation. A tremendous upheaval and much agitation and unrest will follow a construction of the Fourteenth Amendment, which will result in a departure from this principle.

In *Farmers Loan and Trust Company vs. Minnesota,* this court, in holding that the protection which Minnesota affords the holder of bonds, issued by one of its governmental subdivisions, is not sufficient to justify that state in taxing the transfer by death of those securities when owned by a non-resident, uses the following language (211-212):

> "* * * We think the general reasons declared sufficient to inhibit taxation of them [tangibles] by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. * * * We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles."

This statement is dicta, as a decision of the point involved (whether a debt is property within the jurisdiction of the debtor's domicile) did not require that this court adopt a single situs for the taxation of intangibles. That the court has not committed itself to that doctrine is evidenced from the following language in the same opinion, to which we have heretofore called attention (213):

> "*New Orleans vs. Stempel,* 175 U. S. 309; *Bristol vs. Washington County,* 177 U. S. 133; *Liverpool & L. &*

G. Ins. Co. vs. Orleans Assessors, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

Mr. Justice Stone, while concurring in the opinion that Minnesota had no jurisdiction to tax this transfer, did not concur in so much of the opinion as casts doubt on the constitutionality of double taxation. On page 215, he said:

"Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohibiting taxation merely because it is double, at least until that characterization is more precisely defined.

"It seems to me to be unnecessary and undesirable to lay down any doctrine whose extent and content are so dubious. Whether it is far-reaching enough to overturn those cases which, in circumstances differing somewhat from the present, have been regarded as permitting taxation in more than one state, reaching the same economic interest, is so uncertain as to suggest doubts of its trustworthiness and utility as a principle of judicial decision." (Citing several cases.)

The decision in so far as it holds that the situs of debts exists with the creditor and not with the debtor has been

followed in *Baldwin vs. Missouri*, 281 U. S. 586, and *Beidler vs. South Carolina*, 282 U. S. 1.

In the case of *Baldwin vs. Missouri, supra*, this court held that a deposit owned by a resident of Illinois in a Missouri bank could not be taxed by Missouri, nor could debts owing a resident of Illinois by a resident of Missouri be taxed by the latter, though some of the debts were secured by mortgages on land in Missouri, and though the evidences of indebtedness were physically within Missouri. This case does not hold that there can be but a single situs for the taxation of intangibles and that the state of the domicile of the decedent alone may tax, but merely that the state of the debtor's domicile has no jurisdiction to impose such tax.

Beidler vs. South Carolina, supra, involved the right of South Carolina to tax a debt owed by a South Carolina corporation to a non-resident. Although in that case the deceased owned shares of stock in a South Carolina corporation, a tax was paid South Carolina on their transfer and no question of jurisdiction of South Carolina to levy such a tax was raised.

As we read these cases, they hold that debts have a situs only at the domicile of the corporation, and that that state alone can tax their transfer by death. The obvious difference between the interest of a shareholder in a corporation and the interest of a creditor in the property and business of his debtor remove them as authority for the principle that the state of the domicile of the corporation may not tax the transfer by death of shares of stock owned by a non-resident.

III.

Before Property Can Join in a Universal Succession it Must Pay a Tax to the Singular Succession.

If the state of the domicile of the corporation has jurisdiction of the shares of stock therein, it may levy a tax and make the payment thereof a condition precedent to permitting these shares to join the universal succession at the domicile of the owner.

The law of the state of the domicile of the decedent operates in another state only by comity of the latter.

Frick vs. Pennsylvania (see quotation, *supra*, page 14).

In *Pullman's Car Company vs. Pennsylvania*, 141 U. S. 18 (22), the court say:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state."

In *Magoun vs. Grima*, 8 How. 490, this court in sustaining the constitutionality of an inheritance tax of the state of Louisiana, levying a tax of ten per cent on legacies when the legatee is not a citizen of the United States nor domiciled in Louisiana, say (493):

> "Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament or by inheritance; and of prescribing who shall and who shall not be capable of taking it."

In *Knowlton vs. Moore*, 178 U. S. 41 (54), speaking of the theory of an inheritance tax, the court say:

> "The tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

In *Maxwell vs. Bugbee*, 250 U. S. 525, this court in upholding the right of the state of New Jersey to levy an inheritance tax on the transfer of property owned by a non-resident within its jurisdiction, which tax was measured by the ratio in value of such property to the entire estate, including real and personal property in another state, say (541):

> "The state is dealing in this instance not with the transfer of the entire estate, but only with certain classes of property that are subject to the jurisdiction of the state. It must find some rule which will adequately deal with this situation."

And on page 542:

> "The transfer of the non-resident's estate is taxed only so far as his estate is located within the jurisdiction and only so far as it comes within the description of * * * 'shares of stock of corporations of this state.'"

IV.

The Real Subject of This Tax Is the Shifting of Economic Benefits and Burdens of Property From the Dead to the Living.

The power to levy an inheritance tax depends upon the place where there occurs that shifting of the economic bur-

dens and benefits of the property which is the subject of the succession.

Saltonstall vs. Saltonstall, 276 U. S. 260.

Tyler vs. U. S., 281 U. S. 497.

This shifting may take place in jurisdictions other than that of the state in which the deceased was a resident.

In the case of shares of stock in a domestic corporation, Maine has determined that such shifting of ownership takes place in that state. That determination is both economically and legally sound. Can it be said that the due process clause of the Fourteenth Amendment is violated?

In *Billings vs. Illinois*, 188 U. S. 97 (104), the court say:

> "We must regard the power of the state over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution."

Similarly, the right to succeed completely to the deceased's interest in all his property may be made the subject of a tax by the state of the deceased's domicile, and the value which the shares possess after they have paid a tax to the state which gave the corporation life, protects its property and permits it to function, may be included in determining the value of the beneficiary's right of succession.

CONCLUSION.

This court should not reach a decision which would result in overruling all its previous decisions holding that the interest of a shareholder in a corporation is property within the jurisdiction of the state of the domicile of the corporation and subject to an inheritance tax upon the death of a non-resident owner. Neither should it hold that the state of

the domicile of the corporation alone can levy a tax under these circumstances.

The most equitable principle, no doubt, is that suggested by this court in the Frick case—that the state of the domicile of the corporation has the right to tax the transfer by death of shares of stock owned by a non-resident superior to that of the domicile of the owner; that the state of the domicile of the owner can tax the value of the stock in the corporation in excess of the amount of the tax paid the state of the corporation's domicile.

Respectfully submitted,

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DEC 7 193

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,
Appellant,

vs.

STATE OF MAINE,
Appellee.

BRIEF

FOR JAMES TURNER, HENRY E. WORCESTER, AND CENTRAL HANOVER BANK AND TRUST COMPANY, EXECUTORS OF THE ESTATE OF JAMES N. JARVIE, DECEASED, AS AMICUS CURIAE.

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INDEX.

	Page
Motion for leave to file brief as amicus curiae	1
Statement of case	3
Question presented	4
Interest of executors of the estate of James N. Jarvie, deceased, in the question presented in the case at bar	4
Summary of argument	7
Argument	11
I. The principles enunciated in the Farmers Loan and Trust case, and subsequently applied in the Baldwin and Beidler cases, should be applied to the inheritance taxation of stock	11
II. The doctrine of stare decisis does not prevent this Court from applying the principles of the Farmers Loan and Trust, Baldwin and Beidler cases to the inheritance taxation of stock	22
Conclusion	31

Cases Cited.

Allen-West Commission Co. v. Grumbels, 129 Fed. 287, 290	12
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Bullen v. Wisconsin, 240 U. S. 625, 631, 60 L. Ed. 830, 835 17
Church et al. v. Citizens Street R. Co., 78 Fed. 526, 530 12
Corry v. Baltimore, 196 U. S. 466, 49 L. Ed. 556 (1905) 23, 26
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Eidman v. Martinez, 184 U. S. 578, 592, 46 L. Ed. 697, 704 17
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Ennis et al. v. Smith et al., 14 Howard 400, 424, 425, 14 L. Ed. 472, 483 17
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Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058 (1925) 23, 27
Frick v. Pennsylvania, 268 U. S. 473, 497, 69 L. Ed. 1058, 1065, 1066 (June 1, 1925) 18
Hawley v. Malden, 232 U. S. 1, 12, 58 L. Ed. 477, 482 .. 12
Harrison et al. v. Nixon, 9 Peters 483, 504, 9 L. Ed. 201, 209 17
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Liverpool and L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762 29
Mastry v. Arkansas National Bank et al., 93 Fed. 603, 607 (1899) 14
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Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 93, 74 L. Ed. 180, 184 12
Talbott v. Board of Commissioners, 139 U. S. 438, 440, 35 L. Ed. 210 24
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Travelers Insurance Co. v. Connecticut, 185 U. S. 364, 46 L. Ed. 949 (1902) 23, 25
Tucker v. Curtin, 148 Fed. 929, 932 12
26 U. S. C. A., Sec. 1093 18
Vanstone v. Goodwin, 42 Mo. App. 39, 47 ..... 12, 14

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Revised Statutes Missouri 1929, Sec. 570 5
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26 R. C. L., p. 209..... 24
Report of Committee on State and Local Taxes and Expenditures 19
Thompson, Corporations, 3rd Ed., Vol. 5, Sec. 3491, p. 331..... 14
Woerner, The American Law of Administration, 3rd Ed., Vol. 2, Sec. 226, p. 758..... 17
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,
Appellant,

vs.

STATE OF MAINE,
Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for James Turner, Henry E. Worcester and Central Hanover Bank and Trust Company, executors of the estate of James N. Jarvie, deceased, having previously secured permission of the parties in the case at bar, respectfully move this Honorable Court for leave to file the accompanying brief in this action as amicus curiae.

JOHN M. PERRY,
SAMUEL W. FORDYCE,
THOMAS W. WHITE,
HENRY J. RICHARDSON,
Counsel for Executors of Estate of James N. Jarvie, Deceased.

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Appellant,

vs.

STATE OF MAINE,
Appellee.

STATEMENT OF CASE.

From the agreed facts it appears that Edward H. Haskell died testate, a resident of Massachusetts, January 8, 1924. At his death he owned stock in the Great Northern Paper Company, a corporation organized and existing under the laws of the State of Maine. His will was probated in Massachusetts, which levied and collected a transfer tax on legacies and distributive shares, made up in greater part of the proceeds of said stock. The State of Maine claimed a tax on the transfer of his shares of stock in the Great Northern Paper Company, which tax, after deducting therefrom the amount paid the State of Massachusetts, amounts to $30,139.88 (R. 5-7). Substantially all of the Great Northern Paper Company's property is located in the State of Maine (R. 10).

QUESTION PRESENTED.

James Turner, Henry E. Worcester and The Central Hanover Bank and Trust Company, executors of the estate of James N. Jarvie, deceased, are interested solely in the question whether a statute imposing an inheritance tax on the transfer of shares of stock owned by a nonresident in a corporation created by the taxing state, and owning property and doing business within that state, violates the due-process clause of the Fourteenth Amendment to the Constitution of the United States.

INTEREST OF THE EXECUTORS OF THE ESTATE OF JAMES N. JARVIE, DECEASED, IN THE QUESTION PRESENTED IN THE CASE AT BAR.

James Turner, Henry E. Worcester and the Central Hanover Bank and Trust Company of New York are the duly appointed, qualified and acting executors of the estate of James N. Jarvie, deceased. Jarvie died on June 21, 1929, while domiciled in New Jersey, and his will was subsequently probated in said state. At his death he owned common and preferred stock in the Missouri Pacific Railroad Company, preferred stock in the St. Louis-San Francisco Railway Company and voting trust certificates of the Kansas City Public Service Company. All of said corporations were incorporated and are existing under Missouri law, and have much of their tangible property in Missouri. The securities representing said stock were not kept in Missouri and were not used as an integral part of any business of Jarvie's localized in Missouri. An inheritance tax, at the rate of 5 per cent, or a total of $25,677.51, was paid on the testamentary transfer of said stock to

New Jersey. The Attorney-General and the Treasurer of the State of Missouri have demanded, and have threatened suit to enforce payment of, a second inheritance tax amounting to $107,204.88 upon this same testamentary transfer, and as authority for their action rely upon the following statutes of Missouri:

Section 570, Revised Statutes Missouri 1929:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, * to persons, institutions, associations or corporations, not hereinafter exempted, in the following cases: *. When the transfer is by will * of property within the state or within the jurisdiction of the state and the decedent was a nonresident of the state at the time of his death."

Section 583, Revised Statutes of Missouri 1929:

"No * corporation * having * under control securities * belonging to or standing in the name of a decedent who is * a nonresident *, including the shares of capital stock * in a * corporation, * shall * transfer the same to the executor, * unless notice of the time and place of such intended * transfer be served upon the State Treasurer and Attorney-General at least ten days prior to said * transfer; nor shall any * corporation * transfer any securities * belonging to or standing in the name of decedent, * including the shares of capital stock * in the * corporation * making the transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the * transfer of such securities * under the provisions of this article unless the State Treasurer and the Attorney-General consent thereto in writing *. Failure to serve such notice * or failure to retain a sufficient portion or

amount to pay such tax or interest as herein provided shall render said * corporation * liable to the payment of the * tax and interest due * upon said securities, * including the charges of capital stock * of * the corporation * making the * transfer, * and in addition thereto a penalty of one thousand dollars *."

These statutes are substantially similar to the statutes of Maine involved in the case at bar.

Believing that the levy of said inheritance tax by the Attorney-General and Treasurer of Missouri is unconstitutional, the executors of Jarvie's estate have brought a suit before a statutory three-judge federal court sitting in St. Louis, Missouri, to restrain the collection thereof. This suit is styled "James Turner et al. v. Stratton Shartel et al.," is numbered 9460, was argued on November 14th, and is now pending before said court for decision.

Said executors, therefore, have a substantial pecuniary interest in the controversy involved in the case at bar.

SUMMARY OF ARGUMENT.

I.

Page

The principles enunciated in the Farmers Loan and Trust case, and subsequently applied in the Baldwin and Beidler cases, should be applied to the inheritance taxation of stock..... 11

(a) The nature of the property involved in the case at bar is the same in all material respects as that of the property involved in the Farmers Loan and Trust, Baldwin and Beidler cases..... 11

The bonds, notes and debts involved in the Farmers Loan and Trust, Baldwin and Beidler cases were intangible choses in action. Stock is also an intangible chose in action. Bonds are not distinguishable from stock for inheritance tax purposes.

Although finespun legal distinctions can be drawn between stocks and bonds, as a practical matter these distinctions are not sufficient to justify different rules for inheritance taxation of these two forms of intangible choses in action. Such distinctions are disappearing. Stocks are now generally regarded as negotiable securities. Reservation of liens for inheritance taxes is inconsistent with treatment and use of them as such.

(b) The maxim "mobilia sequuntur personam" applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner.. 16

Under Blodgett v. Silberman, stocks have a proper situs for inheritance taxation at the domicile of their owner. All reciprocal states recognize this situs. The law of the domicile governs the distribution of the

property and determines what constitutes the last will of the testator. At such place title passes from the dead to the living. The privilege of succession is there enjoyed.

(c) The view that two or more states may tax on different and more or less inconsistent principles the same testamentary transfer of stock produces discontent among states and has a bad practical effect..... 18

Frick v. Pennsylvania and dictum in Rhode Island Hospital Trust Co. v. Doughton lend support to this view. Reciprocal acts were passed to avoid the evil effect of the rule of these cases. Inheritance taxation by the domicile of the corporation has a bad practical effect—causes delay, loss, expense and great inconvenience to the executors of nonresident's estates. The heaviest burden of such tax is not the payment to the state but the expense of determining the payment. Inheritance taxation of stock at the domicile of the owner does not have such a bad practical effect.

(d) The theories upon which stock may be subjected to an inheritance tax at four places are based upon a wrong premise..... 19

Prior to 1930 authority could be found for the inheritance taxation of bonds and stocks at four places. Such quadruple taxation of bonds and stocks is as startling in the case of the latter as in the case of the former. In regard to both it is based upon a wrong premise. Inheritance taxation of both stocks and bonds should be subject to the same rules. Neither should be discriminated against. Stocks should be protected against multiplied taxation—should be granted the same immunity as other intangibles and tangibles.

(e) The increasing importance of stock in our national life makes protection of it against discrimination and unjust and oppressive taxation a matter of greatest moment..... 21

Primitive conditions have passed as to stock. Dealings in this form of property are conducted on a national scale. Much of the country's wealth is invested in stock. Intangible wealth is increasing. State borders are no longer industrial boundaries.

II.

The doctrine of stare decisis does not prevent this Court from applying the principles of the Farmers Loan and Trust, Baldwin and Beidler cases to the inheritance taxation of stock..... 22

Cases distinguished:

(a) Tappan v. Merchants National Bank..... 23

This case is based on a disregard of the corporate fiction which is no longer sanctioned by this Court, is based on a specific federal statute and involved a property tax.

(b) Travelers Ins. Co. v. Connecticut..... 25

This case is based on specific statutes in force at the time of incorporation, and on the erroneous theory that a foreign shareholder should support the state of incorporation. It involved a property tax.

(c) Corry v. Baltimore..... 26

This case is also based on specific statutes in force at the time of incorporation. It was decided before stock was generally considered, and made, a negotiable instrument, and before intangibles were placed upon

the same basis as tangibles. It, too, involved a property tax.

(d) Baker v. Baker, Eccles Co..... 26

This case did not involve an inheritance tax. The shareholder was not a nonresident.

(e) Frick v. Pennsylvania..... 27

This decision should be confined to the facts and to state statutes similar to those upon which it is based. It was decided before intangibles were placed upon the same basis as tangibles; before Blackstone v. Miller was overruled; and before the theory that an inheritance tax can be levied by the state of incorporation, simply because it created the corporation, was discarded.

(f) Rhode Island Hospital Trust Co. v. Doughton... 29

The statements contained therein are dictum.

Shares of stock do not have a business situs at the domicile of the corporation simply because they are shares of stock.

The Farmers Loan and Trust, Baldwin and Beidler cases should be applied to inheritance taxation of stock even though a nonresident can avoid taxation by transferring his property to a local corporation. The state of incorporation secures an adequate quid pro quo for privileges granted to the shareholder.

ARGUMENT.

I.

THE PRINCIPLES ENUNCIATED IN THE FARMERS LOAN AND TRUST CASE, AND SUBSEQUENTLY APPLIED IN THE BALDWIN AND BEIDLER CASES, SHOULD BE APPLIED TO THE INHERITANCE TAXATION OF STOCK.

All of the considerations and arguments advanced by this Court in support of its decision in the case of Farmers Loan and Trust Co. v. Minnesota, 281 U. S. 204, 74 L. Ed. 371 (January 6, 1930), and subsequently applied in Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056 (May 26, 1930), and in Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131 (November 24, 1930), apply with as great or greater force to prevent the inheritance taxation of stock by the state of incorporation where such stock is owned by a nonresident, has been subjected previously to an inheritance tax by the domicile of such nonresident, and has not become an integral part of any business of the decedent's localized at the domicile of the corporation.

(a) **The nature of the property involved in the case at bar is the same in all material respects as that of the property involved in the Farmers Loan and Trust, Baldwin and Beidler cases.**

It is true that the case at bar involves stock and that bonds were involved in the Farmers Loan and Trust and Baldwin cases, notes in the Baldwin case and ordinary debts in the Baldwin and Beidler cases. However, all such forms of property are ordinary choses in action and were so considered in the cases mentioned above. Stocks have

been so defined in the following cases: Hawley v. Malden, 232 U. S. 1, 12, 58 L. Ed. 477, 482: "* the shareholder's rights * are * in the nature of contract rights or choses in action"; Allen-West Commission Co. v. Grumbels, 129 Fed. 287, 290: "Stock in a corporation is a 'chose in action' "; Church et al. v. Citizens Street R. Co., 78 Fed. 526, 530: "But stocks are mere choses in action *"; Tucker v. Curtin, 148 Fed. 929, 932: "But with reference to matters which like in action, known as 'choses in action,' including shares of corporate stock *"; and Vanstone v. Goodwin, 42 Mo. App. 39, 47: "A 'share' is a species of incorporeal intangible property in the nature of a chose in action."

Bonds are not distinguishable from stock for purposes of inheritance taxation upon the testamentary transfer thereof. Thus, in Blodgett v. Silberman, 277 U. S. 1, 14, 72 L. Ed. 749, 759, this Court said:

> "The question here is whether bonds, **unlike other choses in action**, may have a situs different from the owner's domicile such as will render their transfer taxable for inheritance tax purposes in the state of that situs, and in only that state. **We think bonds are not thus distinguishable from other choses in action.**" (Emphasis ours.)

Moreover, bonds, notes, debts and stocks are all intangible property. Bonds, notes and debts were so classified in the Farmers Loan and Trust, Baldwin and Beidler cases. Stocks have been thus described by this Court in the following cases: Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81, 70 L. Ed. 475, 479: "In the matter of intangibles, like choses in action, shares of stock *"; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 93, 74 L. Ed. 180, 184: "Here we must decide whether

intangibles—stocks, bonds *." See, also: In re Zook's Estate, Hibbard v. Thompson, 317 Mo. 986, 992, 296 S. W. 778: "* the corporate stock here in question is intangible property"; Cooley on Taxation, 4th Edition, Vol. 2, Sec. 455, page 1006: "'Intangible' personalty includes open accounts, * credits, * promissory notes, * bonds, shares of stock * and the like; where the debt or obligation is the thing"; and Fletcher, Cyclopedia of Corporations, Vol. 5, Sec. 3430, page 5620: "Though shares of stock are property, they are intangible and incorporeal property, existing only in abstract legal contemplation."

No doubt finespun legal distinctions can be drawn between stocks and bonds, but if we look at the inheritance taxation thereof as "an intensely practical matter" it is apparent that these distinctions are not sufficient to justify different rules for such taxation of these two forms of intangible choses in action. Under modern corporate financing distinctions based on the different relations of a bondholder and a stockholder to the corporation are slowly disintegrating. Bondholders are frequently accorded all the powers and privileges in management previously associated with common or preferred stock ownership. Convertible bonds are often issued. And conversely the management privileges accompanying many recent so-called "stock" issues, amount to practically nothing. Bondholders' protective committees manage the corporation in times of adversity. Moreover, it is to be noted that stock is included within the definition of intangibles set out in various reciprocal inheritance tax statutes. Nor do those states which have abolished inheritance taxes on the other intangibles of nonresident decedents make any provision for retaining such a levy or shares of stock. (See 40 Yale Law Journal, No. 1, November, 1930, pages 99, 102.) And then, too, attention should be paid to the fact that cor-

porate difficulties frequently cause the bondholders of today to be the stockholders of tomorrow. Furthermore, as far as negotiability is concerned, the distinctions between bonds, notes and stocks are being rapidly wiped out by the adoption of Uniform Negotiable Instrument and Uniform Stock Transfer Acts. The latter act has been adopted in the following territories and states: Alaska, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wisconsin. (See "The Transfer of Stock," Christy, p. 770, note.) And under the latter act stocks are generally held to be negotiable (see Fletcher, Cyclopedia Corporations, Vol. 6, Sec. 3782, page 6301, and Petty v. Knight-Petty Mercantile Co., 93 Okla. 187, 220 Pac. 835)—liens not expressed on the face of the certificate are disregarded. Even in states which have not adopted the Uniform Stock Transfer Act the tendency is to treat stock as commercial paper. Thus in Vanstone v. Goodwin, 42 Mo. App. 39, 47, the Court said: "By an endorsement in blank and delivery of the certificate the share of stock represented by it becomes payable to bearer. It passes like commercial paper *." And even in such states a transferee for value in good faith takes title to the stock free from latent equities between prior parties in the line of transmission, and he may acquire a good title even when his transferor had no title if there are elements of estoppel. (See Thompson, Corporations, 3rd Ed., Vol. 5, Sec. 3491, p. 331.) As long ago as the decision in Masury v. Arkansas National Bank et al., 93 Fed. 603, 607 (1899), public interest was recognized as requiring placing stock certificates as nearly as possible on the plane of commercial paper, the Court in that case stating:

"It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued; that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by simple endorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."

By the adoption of Uniform Stock Transfer Acts and "Blue Sky" Laws the states have done everything in their power to establish the soundness and ready negotiability of stock—to make the certificates circulate as money. The reservation of liens for inheritance taxes upon the transfer of stock is inconsistent with such treatment of them. It needlessly embarrasses and restricts their circulation and prevents their full use for legitimate business purposes. It hampers their use for financial and credit purposes. In so far as it permits inheritance taxation of them by two or more states, it amounts to deprivation of property without due process of law under the decision of this Court in the Farmers Loan and Trust case and should be definitely prevented.

No doubt theoretical legal distinctions can be made be-

tween stocks and bonds, but no sound distinction can be made between the privilege of the succession by the living to the legally protected interest of the dead in these two forms of intangible choses in action. Such privilege is the subject of an inheritance tax. And although these theoretical legal distinctions can be made, they are not greater than the distinctions between tangible and intangible property and do not justify subjecting stock to the harsh and discriminatory multiple inheritance taxation from which bonds, credits and notes have been recently relieved. (See Farmers Loan and Trust Co., Beidler and Baldwin cases, supra.)

It has been the tendency of this Court in recent years to permit only one inheritance tax upon the shifting of one economic interest in property. That tendency has prevented oppressive consequences and should be continued in respect of such taxation of stock.

(b) **The maxim, "mobilia sequuntur personam," applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner.**

That the maxim, "mobilia sequuntur personam," applies to stocks and gives them a proper situs for inheritance tax purposes at the domicile of their owner was clearly held by this Court in Blodgett v. Silberman, 277 U. S. 1, 18, 72 L. Ed. 749, 760 (April 16, 1928). The full significance of this case has been called to this Court's attention on pages 9, 12, 19, 21 and 29 of the brief for the First National Bank of Boston and needs no further comment herein.

As no sound distinction can be made between the inheritance taxation of stocks and bonds, both should be taxed at the domicile of their owner. Such domicile has been chosen by all of the reciprocal states. The law of

such domicile governs the distribution of such property (Harrison et al. v. Nixon, 9 Peters 483, 504, 9 L. Ed. 201, 209; Ennis et al. v. Smith et al., 14 Howard 400, 424, 425, 14 L. Ed. 472, 483; Eidman v. Martinez, 184 U. S. 578, 592, 46 L. Ed. 697, 704, and Bullen v. Wisconsin, 240 U. S. 625, 631, 60 L. Ed. 830, 835). And such law governs to the extent of enjoining executors and legatees from proceeding in foreign courts until the rights of legatees have been determined in the court of the domicile, of determining whether a legacy to stock lapses or not, and of determining the validity of trusts relating to personalty and governing the interpretation of wills relating to that form of property (Woerner, The American Law of Administration, Third Edition, Vol. 3, Sec. 565, page 1930). It regulates the decision as to what constitutes the last will of the testator without regard of the place either of birth or death, or the situation of the personal property at the time (Woerner, The American Law of Administration, Third Edition; Vol. 2, Sec. 226, page 758). At such place the property interest passes in both stocks (In re Zook's Estate: Hibbard v. Thompson, 317 Mo. 986, 995, 996) and other intangibles (Farmers Loan and Trust, Baldwin and Beidler cases, supra). See, also, Direction der Disconto-Gesellschaft v. U. S. Steel Corp. et al., 267 U. S. 22, 28, 69 L. Ed. 495, 498, which is especially applicable where the stock certificates are kept in the decedent's domicile and the state of incorporation has not specifically reserved a lien for inheritance taxes. Furthermore, at the domicile of the decedent the privilege of succession is enjoyed (Mr. Justice [redacted]ne in Farmers Loan & Trust Co. v. Minn., 280 U. S., at p. 214).

(c) The view that two or more states may tax on different and more or less inconsistent principles the same testamentary transfer of stock produces discontent among states and has a bad practical effect.

Frick v. Pennsylvania, 268 U. S. 473, 497, 69 L. Ed. 1058, 1065, 1066 (June 1, 1925), lends support to the theory that both the domicile of the corporation and the domicile of the decedent can levy an inheritance tax upon stock owned by him at his death. This view is also supported by dictum in Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 81, 70 L. Ed. 475, 479 (March 1, 1926). As stock is universally included in reciprocal exemption statutes, it is clear that such statutes were passed to avoid the evil practical effect of the rule of the two cases mentioned above.

Furthermore, it is clear that inheritance taxation by the domicile, or domiciles, of a corporation of stock owned by a nonresident has a bad practical effect. Such taxation usually requires the taking out of ancillary administration, the hiring of local counsel, the furnishing of innumerable affidavits and papers to the local probate courts and the inheritance tax officials, and the payment of all the fees, costs and other expenses attendant upon such procedure. It, and feigned protection of local creditors, cause delay which necessitates keeping executors' bonds in force, prevents speedy distribution of the estate to those ultimately entitled thereto, hinders the executors in selling stock at advantageous times and prices and often causes the estate to lose credit for state inheritance taxes upon the federal estate tax, as the former taxes must be paid within three years after the federal estate tax return is filed if credit is to be allowed (26 U. S. C. A., Sec. 1093). The seriousness of these problems is increased where the decedent owns stock

in corporations incorporated in several states, or in many corporations incorporated in states other than his domicile. They illustrate that the heaviest burden imposed by inheritance taxation at the domicile of the corporation is not the payment to such state, but the expense of determining the amount of such payment. Such taxation at times approaches confiscation—amounts to spoliation in the guise of taxation. (See pamphlet of Finance Department of Chamber of Commerce of the United States, September, 1928, entitled "State Taxes Local, No. 4; State Inheritance Taxation [a method of simplification]; Report of Committee on State and Local Taxes and Expenditures.")

Conversely, subjecting stock to an inheritance tax at the domicile of its owner does not have such a bad practical effect. Assessment of the correct tax is facilitated because witnesses are available to prove or disprove that transfers were made in contemplation of death. Conflicting theories are avoided as to what constitutes transfers in contemplation of death and transfers taking effect in possession and enjoyment at death. Collection is easier for all of the assets of the estate can be reached to enforce payment thereof. All of the delays, expense and loss attendant upon taxation by the domicile, or domiciles, of the corporation are avoided. Only by giving the domicile of the decedent exclusive power to levy an inheritance tax upon stock (business situs excepted) can unjust and oppressive consequences of an extremely serious character be avoided.

(d) The theories upon which stock may be subjected to an inheritance tax at four places are based upon a wrong premise.

In the Farmers Loan and Trust case this Court called attention to the fact that under currently accepted the-

ories the testamentary transfer of bonds could be taxed (1) at the domicile of the owner, (2) at the domicile of the debtor, (3) at the place where the instruments are found—physically present, and (4) where the owner has caused them to become integral parts of a localized business. If the State of Maine is right in its contention that the Farmers Loan and Trust case does not apply to stock, then it is said that stock can be subjected to an inheritance tax at the same four places, viz.: (1) At the domicile of the owner (42 A. L. R., p. 330, and Blodgett v. Silberman, supra), (2) at the domicile of the corporation (42 A. L. R., p. 365, and see Frick v. Pennsylvania, supra), (3) where the certificates are found—physically present (42 A. L. R., p. 380), and (4) where the owner has caused them to become integral parts of a localized business (cf. Brief of Minnesota filed herein, p. 8).

The possibility of taxation of stock at four places is wholly unfair, oppressive and discriminatory when we consider that all other forms of property, real and personal, tangible and intangible, are subject to no such economic burdens.

It is unthinkable that due process of law would permit the corporate structure to be thus torn apart—would permit the bonds and debts of a corporation to be taxed only at the domicile of their owner, and at the same time consent to taxation of stock at four places. If one spoke of the economic wheel is taxed in one way, the other spokes of the same nature should receive like treatment.

If the possibility of such quadruple inheritance taxation of bonds is startling, it is equally startling in the case of stock. If it suggests the wrong premise in regard to such taxation of the former, it suggests an equally wrong premise in regard to such taxation of the latter. The need

for a uniform rule is the same in both cases. The need to end discrimination is just as great in the case of stock as of bonds. Justice and due process of law imperatively demand protection of stock against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. Fairness and due process of law imperatively demand that it be granted an immunity against taxation at more than one place similar to that accorded to tangibles.

(e) **The increasing importance of stock in our national life makes protection of it against discrimination and unjust and oppressive taxation a matter of greatest moment.**

In the Farmers Loan and Trust case this Court said that primitive conditions have passed, that business is now conducted on a national scale, and that a very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is a matter of greatest moment (280 U. S., at pages 211 and 212).

Assuming that this Court had bonds in mind, we wish to point out that primitive conditions have also passed as to stock. In 1890 the total number of shares traded in on the New York Stock Exchange was 71,828,885 (New York Times of January 2, 1921, page 16). In 1930 the total number of shares traded in on the New York Stock Exchange and the New York Curb Exchange was 1,032,894,321 (New York Times of January 1, 1931, pages 48, 44). And certainly these figures also show that the business of trading in stock is conducted on a national scale. Moreover, we wish to call attention to the fact that much of the country's wealth is invested in stock—much more in fact than in bonds. On January 1, 1925, the total market value

of all stock listed on the New York Stock Exchange was $27,072,322,192—the total market value of all listed bonds being $33,611,817,346. On January 1, 1930, these figures had changed as follows: Total market value of all listed stocks, $64,707,872,131; total market value of all listed bonds, $46,892,458,780 (figures taken from New York Stock Exchange year book for 1929-1930).

We are becoming less provincial. Personal and proprietary interests overleap state boundaries with scant regard to their existence. State borders are no longer industrial boundaries. Corporations are created with power to engage in business in every state and foreign country. Private enterprise is being rapidly absorbed into great corporate undertakings. The increase in trade and banking and the growth of our manufactures since the World War tend to make wealth more intangible—tend to increase investments in stock.

Clearly it is a matter of greatest moment that stock be protected against discrimination and unjust and oppressive taxation. Regardless of the rules which were in force prior to this time, **existing** conditions demand that the doctrine of the Farmers Loan and Trust, Baldwin and Beidler cases be clearly applied to stock.

II.

THE DOCTRINE OF STARE DECISIS DOES NOT PREVENT THIS COURT FROM APPLYING THE PRINCIPLES OF THE FARMERS LOAN AND TRUST, BALDWIN AND BEIDLER CASES TO THE INHERITANCE TAXATION OF STOCK.

The cases most frequently cited to sustain the position which the States of Maine, Minnesota and Missouri have taken are: (a) Tappan v. Merchants National Bank, 19

Wall. (86 U. S.) 490, 22 L. Ed. 189 (1874); (b) Travelers Insurance Co. v. Connecticut, 185 U. S. 364, 46 L. Ed. 949 (1902); (c) Corry v. Baltimore, 196 U. S. 466, 49 L. Ed. 556 (1905); (d) Baker v. Baker, Eccles & Co., 242 U. S. 394, 61 L. Ed. 386 (1917); (e) Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058 (1925), and (f) Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69, 70 L. Ed. 475 (1926).

These cases can be distinguished generally by stating that they were all decided before 1930, when this Court in the Farmers Loan and Trust, Baldwin and Beidler cases first held that intangible property should be subject to an inheritance tax only at the domicile of the owner thereof—business situs excepted—and that when so taxed it, as in the case of tangibles, should be immune from taxation at another place. Not until 1930 did this Court thus establish that double inheritance taxation of intangibles is unconstitutional. Not until 1930 did this Court thus place intangibles upon the same plane with tangibles. In so far as these older cases are in confiict with the principles of the 1930 cases, they should be definitely overruled.

Furthermore, these cases may be specifically distinguished as follows:

(a) Tappan v. Merchants National Bank (1874), supra: In the first place, this case can be distinguished on the ground that it is based upon a disregard of the corporate fiction (see 86 U. S. [19 Wall.], at pp. 500, 503); which is no longer sanctioned by this Court (see Eisner v. Macomber, 252 U. S. 189, at p. 214; Rhode Island Hospital Trust Co. v. Doughton, 270 U. S., at pp. 81, 83, and Klein v. Board of Supervisors, 282 U. S. 19, at p. 24). The corporation is a person whose ownership is a nonconductor that

makes it impossible to attribute an interest in its property to its members. The shareholders do not own the corporate property. Secondly, the tax involved in the Tappan case was a direct property tax. Decisions with respect to the situs of property for purposes of such taxation are usually considered of little service in determining the situs of property for purposes of inheritance taxation (26 R. C. L., p. 209; cf. Buck v. Beach, 206 U. S., at p. 408). And finally another difference exists between the Tappan case and the case at bar. The Tappan case is based upon an express federal statute (see 12 U. S. C. A., Sec. 548), in effect, written into the charter of the bank, which authorized the tax involved. Without such special authorization no state tax could be levied (Talbott v. Board of Commissioners, 139 U. S. 438, 440, 35 L. Ed. 210, and Des Moines National Bank v. Fairweather, 263 U. S. 103, 106, 68 L. Ed. 191), and the provisions of the statute operate not only as an authorization, but also as a restriction against discriminatory taxation (see People v. Weaver, 100 U. S. 539, 543, 25 L. Ed. 705), and against such shares being taxed elsewhere than in the state where the corporate enterprise is located. The Tappan case stands for the proposition that the Federal Government created the bank as an instrumentality for the conduct of certain of its functions; that for that reason, and that reason only, states would not be permitted to tax without its authorization, and that in giving its consent it may provide the extent to which, and the jurisdictional basis upon which, a state may tax, and provide a reasonable means of restricting that taxation to a single jurisdiction. In the case at bar the State of Maine has not restricted the taxation of shares of stock in the Great Northern Paper Company to Maine, as Congress has done as to national bank

shares, a thing which Maine has no power to do, but is merely asserting that it will tax, by virtue of having created the corporation, regardless of where the owner may reside. It is submitted, therefore, that a denial of Maine's power to tax the testamentary transfer of the stock involved in the case at bar would not be inconsistent with a continuation of the existing doctrine with respect to taxation of shares of stock in national banks.

(b) Travelers Insurance Co. v. Connecticut (1902), supra: This case also involved a direct property tax. Moreover, the laws of Connecticut under which it was levied expressly provided that stock in Connecticut corporations should be transferable only on the books of the corporation, made the corporation liable for the tax on shares owned by nonresidents, and gave the corporation an express lien to enforce reimbursement therefor from such shareholders. If the contention of Maine and Minnesota in the case at bar is sustained upon the basis of this case, this Court should limit inheritance taxation by the domicile of the corporation to states where these same, or similar, statutory provisions are in force **at the time of incorporation.** In addition, the tax in the Travelers case was sustained in part on the ground that a nonresident shareholder should support the state which created and protected the corporation (see 185 U. S., at p. 368). This argument, although advanced by Mr. Justice Holmes in the Farmers Loan and Trust case, was not followed by the majority of this Court. Moreover, no argument was made in this case that the tax was a violation of due process of law, and it was not shown that the nonresident shareholders were subjected to a second tax upon their shares at their domicile.

(c) Corry v. Baltimore (Feb. 20, 1905), supra. This case also involved a direct property tax and specific statutes of the State of Maryland providing for the assessing and collecting of the tax in substantially the same manner as in the Travelers Insurance Company case. Such statutes also expressly fixed the situs of such shares in Maryland for such tax. (See 196 U. S., at page 472.) As above stated, a rule for inheritance taxation of stock, if based upon this case, should be confined to situations where similar statutes are involved. And it should be confined to situations where similar statutes were in force **at the time of creating the corporation** (Cf. remark of Mr. Justice White, 196 U. S., at page 477)—in force before foreign shareholders bought their stock expecting that it would not be subject to an inheritance tax at their death. Furthermore, in the Corry case no question was raised as to double taxation of the stock involved. Moreover, this case was decided before the adoption of Uniform Stock Transfer Acts—before stock was placed upon the same plane as commercial paper. And it was decided before a unit rule was adopted for the taxation of tangibles (see Union Transit Co. v. Kentucky [Nov. 13, 1905], 199 U. S. 194, 50 L. Ed. 150), and before intangibles and tangibles were placed upon the same basis by this Court in the Farmers Loan and Trust, Baldwin and Beidler cases. In short, it was decided under conditions which were radically different from those now prevailing.

(d) Baker v. Baker, Eccles Co. (1917), supra. This case is distinguishable on several grounds. First, it did not involve an inheritance tax upon stock, or, for that matter, any tax. The remark of Mr. Justice Pitney that a state which created a corporation has such control over the transfers of its shares that it may tax the succession (242 U. S., at page 401) is pure dictum. Second, this case cites

and relies upon Blackstone v. Miller (1903), 188 U. S. 189, 47 L. Ed. 439, which was definitely overruled by this Court in the Farmers Loan and Trust case. Third, the decedent who owned the stock was apparently a resident of the state of incorporation. And, fourth, the doctrine of this case should not be allowed to conflict with the later case of Direction der Disconto-Gesellschaft v. U. S. Steel Corporation, 267 U. S. 22, 69 L. Ed. 495 (1925).

(e) Frick v. Pennsylvania (1925), supra. This case can be distinguished upon the grounds mentioned on pages 11, 28 and 29 of the brief of the appellant in the case at bar. We will not repeat what has been said there. However, we wish to call attention to the fact that it can also be distinguished on other grounds. In it Mr. Justice Van Devanter characterized the inheritance taxes paid to West Virginia and Kansas, the states of incorporation, as **superior claims**; and said that to bring the stock in these corporations into administration in Pennsylvania, the domicile of the decedent, it was **essential** to pay an inheritance tax to West Virginia and Kansas (268 U. S., at pages 497 and 498). In part, he considered such West Virginia and Kansas inheritance taxes **superior claims** because the statutes of such states, to which he referred, gave those states the status of lienors in possession (268 U. S., at page 497, note 4). These statutes provided as follows: Kansas (Ch. 357, Laws Kan. 1915, p. 452 et seq.): Section 2, "* Property of which a decedent died seized or possessed, subject to a tax as aforesaid, in whatever form of investment it may happen to be * shall be charged with a **lien** for all taxes and interest thereon which are or may become due on such property. *" West Virginia (Hogg, W. Va. Code 1913, Vol. 1, c. 33, ss. 1306 et seq.): Section 7 (Sec. 1314):

"All such taxes upon any transfer shall, until paid, be and remain a **lien** upon the property transferred * and no title shall vest or be transferred as to any such property, except subject to the lien for such taxes *." These statutes expressly created liens for inheritance taxes. All states do not have such statutes. In some, Missouri, for example, the statute simply makes the executors and the corporation personally liable for the inheritance tax upon stock. Consequently if this case be deemed authority for allowing an inheritance tax by the state of incorporation, any such rule announced by this Court should be confined in its application to situations where express liens therefor are reserved. However, this Court cannot now consistently permit the domicile of the corporation to tax upon the sole ground of this reserved lien, for at the time the Farmers Loan and Trust case was decided the inheritance tax law of Minnesota provided: "Every tax imposed by this act shall be a **lien** upon the property embraced in any inheritance * bequest, legacy * until paid" (Mason's Minn. Statutes 1927, Vol. 1, Sec. 2297). This statute expressly created a lien in behalf of Minnesota for its inheritance tax upon the bonds involved in the Farmers Loan and Trust case. Clearly, then, this Court should not say that an inheritance tax can be levied by the state of incorporation simply because it has the status of a lienor in possession. Furthermore, the Frick case is not controlling because it was based upon Blackstone v. Miller, supra, and the theory that intangible personalty was on a different footing from tangible personalty (268 U. S., at page 494). This theory has been definitely repudiated. And, finally, if the Frick case is to control in the case at bar, then Blodgett v. Silberman, supra, should be definitely overruled, for two states should not be allowed to levy an

inheritance tax upon the testamentary transfer of the same stock.

(f) Rhode Island Hospital Trust Co. v. Doughton (1926), supra: This case is adequately distinguished on pages 29 and 30 of appellant's brief.

In its brief (p. 8) the State of Minnesota says that shares of stock owned by a nonresident may be said to have a business situs within the state of the corporation's domicile and thus become integral parts of some local business within the doctrine of the cases of New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174, and Liverpool and L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, and Bristol v. Washington County, 177 U. S. 133, 44 L. Ed. 701. It is difficult for us to understand the applicability of this argument, for we have been unable to find any cases where it has been applied to facts at all similar to those involved in the case at bar. "Business situs" means "a situs in another state where a nonresident is doing business through an agent or manager, in which business and as a part thereof the nonresident's property is used and comes within the protection of such state" (see Cooley, Taxation, 4th Ed., Vol. 2, p. 1032). In the case of a nonresident shareholder of a corporation, he cannot be held to do business in the state of incorporation simply because of his relation to the corporation. The corporation may do business in the state, but the nonresident shareholder does not. He is granted no franchises, pays no license fees, and is not subject to service of process in personal actions in said state. The corporation pays in full for all franchises granted to it. It is the business of the corporation and not the business of the shareholder which is protected by local law. The corporate fiction is a nonconductor behind which

we cannot look. The property of the shareholders in their respective shares is distinct from the corporate property and franchises (Hawley v. Malden, 232 U. S., at p. 9). Moreover, it is clear that the nonresident shareholder's stock—his chose in action against the corporation—is not used as a part of the business of the corporation. In addition, unless the stock certificate is kept in the state of incorporation, the paper itself is not protected by, or used in, that state. Perhaps it can be said that a nonresident shareholder does business in the domicile of the corporation by voting for the directors of the corporation. But what if the shareholder does not vote regularly? There is no business situs if the business is not continuous and permanent in character (Cooley, Taxation, 4th Edition, Vol. 2, p. 1037). And what shall be the rule if a bondholders' protective committee is in charge, or if the nonresident owns preferred or nonvoting common stock, or voting trust certificates? Perhaps, too, it may be said that the nonresident's stock has a business situs if he regularly attends shareholders' meetings in the state of incorporation. But what if he attends such meetings only irregularly, or not at all? What if the shareholders' meetings are regularly held outside of the state of incorporation as is the common practice in regard to Delaware corporations? And if we say that stock has a business situs in the domicile of the corporation simply because it is stock in the corporation, shall we say that that fact prevents the certificate from having a business situs at the place where they are pledged as collateral for loans, or at the place where they have become a part of the corpus of an active trust? These consid-

erations make it clear that the doctrine of business situs should not be applied in the case at bar.

In Minnesota's brief filed herein (p. 10) it is suggested that the Farmers Loan and Trust decision should not be applied to stock because a nonresident who owns real estate can escape taxation at the situs thereof by incorporating his holdings. This may be true, but it is also true that a state which permits incorporation charges large amounts as incorporation fees, franchise taxes, and ordinarily imposes income taxes upon the corporation. These fees and additional taxes are an adequate quid pro quo for all of the privileges granted to the shareholders of the corporation. Furthermore, it is clear that the iron mine itself does not circulate freely as negotiable paper in the financial and credit markets of the country at places far removed from its physical location.

CONCLUSION.

Under the authority of the Farmers Loan and Trust, Baldwin and Beidler cases this Court should hold that the testamentary transfer of stock is taxable only at the domicile of its owner, except, possibly, where the certificates are actively used as a part of a business of the shareholders in another state, or form a part of the corpus of a trust in such other state. Only in this way can unjust and oppressive double taxation of such intangibles be avoided. Only in this way can the present confused and chaotic condition of inheritance taxation be ended. And only in this way can justice and fairness be done to the taxpayer. Such taxation, when based solely on power, prevents the smooth

working of the federal system. The rule of stare decisis does not prevent such a decision.

Respectfully submitted,

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DEC 10

CHARLES

IN THE

Supreme Court of the United States of America.

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased, *Appellant,*

vs.

STATE OF MAINE, *Appellee.*

Motion on Behalf of the Tax Commission of the State of New York for Leave to File Brief as *Amici Curiae* and Brief.

SETH T. COLE,
Counsel for Amici Curiae.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX TO BRIEF.

Page

Motion for Leave to File Brief as amici curiae 1
Statement 2
Argument 4

CASES CITED.

Auditor General v. Bassett's Estate, 246 Mich. 440 19
Baldwin v. Missouri, 281 U. S. 586 5
Beidler v. South Carolina Tax Commission, 282 U. S. 1 5
Blackstone v. Miller, 188 U. S. 189 ..... 5, 16, 17
Blodgett v. Silberman, 277 U. S. 1 ..... 9, 14, 17
Citizens' Telephone Co. v. Fuller, 229 U. S. 322 23
Corry v. Baltimore, 196 U. S. 466 6
Farmers' Loan and Trust Co. v. Minnesota, 280 U. S. 204 5
Frick v. Pennsylvania, 268 U. S. 473 ..... 14, 22
F. S. Royster Guano Co. v. Virginia, 253 U. S. 412 23
Heisler v. Thomas Colliery Co., 260 U. S. 245 23
Home Insurance Co. v. New York, 134 U. S. 594 23
Keeney v. New York, 222 U. S. 525 ..... 14, 23
Matter of Swift, 137 N. Y. 77 14
Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132 .. 23
Plummer v. Coler, 178 U. S. 115 20
Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69 12
Schlesinger v. Wisconsin, 270 U. S. 230 23
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304 23
Southwestern Oil Co. v. Texas, 217 U. S. 114 23
Stebbins v. Riley, 268 U. S. 137 23
The Delaware Railroad Tax Case, 18 Wall. 206 17
Watson v. Comptroller, 254 U. S. 122 23

OTHER CITATIONS.

Maine, R. S. 1916, Chapter 51, Secs. 36-37 18
New York Laws 1930, Chapter 710 7
New York Times, January 19, 1930, Section 3, page 5, column 4 12
Proceedings National Tax Association, 1926, pp. 328-329 7
Proceedings National Tax Association, 1929, pp. 200-226 9
Report of New York State Bar Association, Vol. XLVIII, pp. 242-245 .. 12
Reports of New York State Bar Association, Vols. XLIX, L, LI, LII and LIII 12
Reports of Proceedings of National Conferences on Inheritance and Estate Taxation held at Washington, D. C., February 19-20, 1925, and New Orleans, La., November, 1925 11
Uniform Stock Transfer Act, 6 U. L. A. 2 18

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COME NOW, Thomas M. Lynch, John J. Merrin and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiae*.

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IN THE

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No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of EDWARD H. HASKELL, Deceased,

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Appellee.

Brief on Behalf of the Tax Commission of the State of New York as Amici Curiae.

Statement.

In this case a determination by this Court is sought on the most serious current question relating to the imposition of death taxes by the states, and the decision will rank among the most important in that field of law. The question is whether the state in which a corporation is domiciled may impose an inheritance or transfer tax upon

shares of stock of such corporation owned by a nonresident decedent and transferred at and by virtue of the death of such decedent. Necessarily, the decision will apply to laws imposing estate taxes as well as those which impose inheritance taxes, because the fundamental issue is one of jurisdiction to impose a death tax and is not confined to a particular form of the tax. If there be jurisdiction to impose an inheritance tax, that same jurisdiction will permit the imposition of an estate tax, and, if there be not jurisdiction to support the one kind of tax, there cannot be jurisdiction to support the other.

The decedent in this case died in 1924 and at the time of his death was domiciled in the State of Massachusetts, where his will was probated. The assets of his estate included certain shares of stock in the Great Northern Paper Company, a corporation of the State of Maine, the property of which was principally located in Maine. It is conceded by the parties to the proceeding that at the time of the decedent's death the certificates representing the stock were physically within the State of Massachusetts and that they did not have a business situs in the State of Maine, although it is not believed that these points are material to the determination of the issue.

This brief is offered on behalf of the Tax Commission of the State of New York because said Commission deems it to be of paramount public interest that a sound and logical system of death taxation be established and maintained, not alone in the State of New York, but throughout the United States. With increased demands upon national and state treasuries and reduced yields of present taxes making necessary the enactment of laws increasing the rates of existing taxes and the tapping of new tax resources, it

is of the utmost importance that equitable principles of taxation should prevail and that, so far as is possible, friction between the states and the Federal Government on the one hand, and among the states themselves on the other, should be reduced to a minimum. This Court has recognized that multiple death taxation by the states does not comport with sound principles of taxation. It is also undoubtedly true as a matter of policy, that the assets of a decedent's estate should be subjected to taxation but once. It is thought that both principle and policy find support in the basic law embodied in the Constitution of the United States and that the same prevents the levying of taxes by more than one jurisdiction. The New York Tax Commission believes that the present is a crucial period in the development of death taxation in this country and that a false step may make it difficult for the states to retain the death tax as a source of substantial revenue.

Argument.

POINT I.

The Fourteenth Amendment to the Constitution of the United States prohibits any state, other than that in which a decedent was domiciled at the time of his death, from imposing a death tax with respect to any of the intangible personal property owned by such decedent.

True it is that there has been some confusion of thought concerning the power of a state, other than that in which a decedent was domiciled, to exact contributions in the form of death taxes upon the transfer of his intangible personal property. Until recently, the tendency was to-

ward a liberal construction of state powers in that direction. In January, 1930, in *Farmers' Loan and Trust Co. v. Minnesota,* 280 U. S. 204, this Court, in a broad and sweeping decision, gave recognition to the evils which had developed as a result of the exercise of these powers and which were sanctioned, in part at least, by its former decisions, and, abandoning the old landmarks, set a new course in keeping with the spirit, thought and economic development of the present day. In so doing, it put the case of *Blackstone v. Miller,* 188 U. S. 189, and other cases supporting it, on the *Index Expurgatorius.* (see Mr. Justice Holmes' opinion in *Baldwin v. Missouri,* 281 U. S. 586).

Examination of the Minnesota and Missouri opinions, together with the opinion in *Beidler v. South Carolina Tax Commission,* 282 U. S. 1, indicates that this Court has definitely taken the position that double or multiple taxation of transfers at death is not permitted by the Fourteenth Amendment. In the Minnesota case, Mr. Justice McReynolds said (p. 209):

> "*Blackstone v. Miller, supra,* and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the 14th Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable."

It is, of course, conceivable that this Court may limit the Minnesota case, and the subsequent Missouri and South Carolina cases, to the specific facts with which they were directly concerned and hold that under different facts, or in respect to intangibles of a different character, double or multiple death taxation is not prohibited, but a careful study of the opinions in these cases affords no basis for anticipating such action. Possibly it may be decided that intangibles which had acquired a business situs in a state in which the deceased owner was not domiciled may be taxed by both the state of his domicile and that of business situs, or, where the deceased owner of shares of corporate stock and the corporation issuing such shares were domiciled in different states, that each state may tax the shares. It is also possible that a rule of single taxation may be laid down under which the domicile of the decedent may not be permitted to tax certain intangibles as, for example, that corporate shares may be taxed only by the state of domicile of the corporation or that intangibles having a business situs may be taxed only by the state in which the business is carried on. Still another possibility is that under the doctrine of *Corry v. Baltimore*, 196 U. S. 466, the state of domicile of the corporation may be permitted to collect a death tax where its laws fix the situs of the shares within its boundaries, such tax to be either exclusive or in addition to a tax by the state of domicile of the owner, but, in the absence of a law so fixing the situs of the shares, the death tax to be collected only at the domicile of the owner. The bare existence of these and other possible conflicts of jurisdiction indicates the desirability of a system under which the death taxation of all intangibles will be permitted at the decedent's domicile and restricted to that jurisdiction. It is at the domicile of the decedent that his estate is usually administered, and it is there that

the death tax processes may be cared for in an orderly manner. Taxation at the domicile of the decedent also eliminates the possibility of a shift of incorporated companies to states which do not impose death taxes for the purpose of relieving shareholders from their burden, which might occur if the state of domicile of the corporation alone should be permitted to impose the tax. There are evidences that in the past such changes in incorporation have taken place for the purpose of avoiding nonresident death taxation (See Proceedings National Tax Association, 1926, pp. 328-329). Such taxation also prevents the man of wealth from evading taxation by organizing a holding corporation in a state which has no death tax and transferring to it all of his intangible assets, thereby depriving the state of his domicile of all death taxes with respect thereto.

The State of New York has already framed its death tax law in such manner that no attempt is made to reach intangibles of nonresident decedents (see Chapter 710, N. Y. Laws of 1930). By this chapter a new article imposing an estate tax was added to the Tax Law, and to Section 249-p thereof was appended the following legislative note:

> "Note.—This section imposes a tax on real property situated and tangible personal property having an actual situs in this state forming part of a nonresident estate. Such tax is a pro rata share of what the tax would be on the gross estate of such a decedent, except that real property situated and tangible personal property having an actual situs outside the state is not included in the calculation for the reason that similar properties owned by a resident decedent are not included and to include them in the case of a nonresident decedent might be discriminatory, although authority for so doing may possibly be found in the case of Maxwell v. Bugbee, 250 U. S. 525. In view of the extent of the reciprocal death tax exemption movement throughout the United States and the recent de-

cision in Farmers' Loan and Trust Company v. Minnesota, 280 U. S. 204, no provision whatever is made for imposing a tax with respect to intangible personal property of a nonresident decedent, even though it may consist of shares of stock in a domestic corporation or intangible property which has a business situs in this state."

Several other states do not attempt to tax intangibles owned by nonresident decedents.

The reasons advanced for permitting double taxation of the intangibles involved in the Minnesota, Missouri and South Carolina cases were fully as potent as can be presented for double taxation because of business situs or corporate domicile, and the considerations which favor the elimination of multiple death taxation are equally strong without regard to what the facts may be as to the situs or the nature of the intangibles. Assuming, therefore, that multiple death taxation of intangibles is to be proscribed; let us consider what state has the power to impose the single tax. Is it to be the state of domicile of the decedent in all cases, or the state of domicile of the corporation in the case of corporate shares, the state of business situs where the intangibles have such a situs, or possibly some state other than that of the decedent's domicile for some other reason?

From the standpoints of economy and correct tax theory, it would seem that the best interests of the states will be served if it be determined that all intangible personal property may be subjected to death taxation at the domicile of the owner and not elsewhere. Very few, if any, of the states would wish to forego the right to tax certain intangibles of residents for the privilege of taxing similar

intangibles of nonresidents, and such procedure would not be in accord with what has come to be generally recognized as the sound principle of death taxation.

This Court is conversant with the movement for reciprocity in death taxation which has been under way since 1924. It is described in detail in the brief filed on behalf of the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, as *amici curiae,* in *Blodgett v. Silberman,* 277 U. S. 1. Reciprocity is based upon the principle that the state of domicile of a decedent has power to impose a death tax on all of his intangibles, and the movement has received official sanction in more than three-fourths of the states.

The progress of reciprocity is shown by the report of the Committee of the National Tax Association on Reciprocity in Inheritance Taxation to the Twenty-second National Tax Conference held in 1929 (see Proceedings National Tax Association, 1929, pp. 200-226). It was summarized in the following language (p. 203):

> "The great success which has attended the campaign for reciprocity during the current year seems to indicate that in a short time the duplicate taxation of inheritances by the states will be abandoned absolutely. At the present time, thirty-seven states, the District of Columbia, the Territory of Hawaii, the Province of Ontario of the Dominion of Canada, and the Territory of the Yukon, have cooperated in this movement to abolish double inheritance taxes, leaving but eleven states, these chiefly of the west.
>
> "It is interesting to note that the entire Union east of the Mississippi River, except the State of Kentucky, is in the movement.
>
> "Turning to statistics, it is interesting to note that assuming that the population of the United States

is 105,000,000, as it was in the census of 1920, 91,398,578 may now die peacefully with the assurance that there will be no duplicate taxation by the states upon the intangible assets of their estates."

Should it be decided that the state of domicile of a decedent has not the power to assess a death tax with respect to any of his intangibles, regardless of their character or where situated, the reciprocity movement would be given an effect directly contrary to its purpose. If it should be held that shares of corporate stock are taxable only by the domicile of the corporation, or that intangibles which have a business situs are taxable only by the state of such situs, and the state of domicile of the corporation, or that of the business situs, as the case might be, should have a reciprocity law, it would be prohibited from exercising its power of taxation until such time as such law might be repealed. In the majority of the states, the legislature does not meet annually, and in many states, unless special sessions were called; there would necessarily be a considerable period of time during which such intangibles would be entirely exempted from taxation. The confusion, inconvenience and loss of revenue which would follow from denying the state of domicile of a decedent the power to exact a death tax on account of any of his intangibles cannot be overemphasized.

If the decision should be that the state of his domicile alone has the power to tax all intangibles of a decedent, reciprocity statutes would become superfluous, but no harm would result, as such a decision would effectually and completely bring about the end for which reciprocity was intended.

Reciprocity was designed to make effective the second of the principles enunciated in the report of the committee

appointed by the National Conference on Inheritance and Estate Taxation, viz: that all intangible personal property should be subjected to death taxation but once and by the state of domicile of the decedent (see Reports of Proceedings of National Conferences on Inheritance and Estate Taxation held at Washington, D. C., February 19-20, 1925, and New Orleans, La., November, 1925). The reports of these Conferences show that the best thought of economists, business men and tax officials throughout the Nation is in accord on the principle that the state of a person's domicile should have the power to impose a death tax on all of his intangibles, to the exclusion of all other states.

Another aspect of a decision that corporate stock may be taxed only by the domicile of the corporation should be noted. An illustration based upon actual facts will be used. A copper magnate is domiciled in the State of New York at the time of his death. He is possessed of a large fortune represented principally by shares of stock in a corporation owning copper mines in Montana. The mining corporation was organized under the laws of Maryland and is domiciled there. There are substantial reasons why New York, the state of the decedent's domicile, should have the power to levy a death tax on his intangible wealth. The owner resided there and his wealth as well as his person had been protected by its laws. Strong reasons may also be advanced in favor of permitting Montana to collect a death tax. The corporation owned its property and carried on its business there, and the decedent's wealth was the product of its mines. What can be said in favor of a tax by Maryland? The corporation maintained an office there, it is true, but that was merely for the purpose of complying with legal requirements. The corporation did no business in that state and had its

domicile there only for reasons of convenience. Maryland had been repaid for all of the privileges which it granted to the corporation through the medium of taxes levied upon it. Surely, much more could be said in favor of the imposition of a death tax by Montana than by Maryland, but, upon examination of the law, it is found to be definitely settled by this Court that Montana has not the power to tax (see *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69). Are both New York and Montana to be denied a tax in favor of Maryland? Or is the decision to be that the state of the decedent's domicile, which has the strongest legal and equitable claim, is to have the power to tax?

Perhaps the first jurist of distinction to claim that the Constitution of the United States forbade the extraterritorial death taxation of intangibles was Judge Alphonse T. Clearwater of New York, who at the Forty-eighth Annual Meeting of the New York State Bar Association in 1925, in a masterful and emphatic manner, laid bare the abuses of nonresident death taxation and called for action to correct them (see Report of New York State Bar Association, Vol. XLVIII, pp. 242-245). As a result of Judge Clearwater's address, the New York State Bar Association appointed a Committee on Extraterritorial Taxes which has given careful consideration to the subject and has submitted reports in subsequent years (see Reports of New York State Bar Association, Vols. XLIX, L, LI, LII and LIII). Because of the fact that Judge Clearwater was a pioneer in thought on the question under consideration, the Court will be interested in his comment on the Minnesota decision. In a communication to the editor of the New York Times, which appears in the issue of January 19, 1930, section 3, page 5, column 4, he said:

"For several years the taxing authorities of the State of New York and of some other States have imposed upon the estates of decedents holding securities issued by corporations incorporated in or created by a State other than that of the domicile of the decedent an extraterritorial tax; that is, if a resident of New York holding stock in a corporation organized in or created by the laws of another State dies, his beneficiaries have been compelled to pay not only the Federal and New York transfer tax but sometimes a third, fourth and fifth tax imposed by a State under the laws of which the corporation or corporations were organized.

"It frequently has been said that I was the first lawyer in the United States publicly to denounce this system and to characterize it as unconstitutional, illegal, extortionate and iniquitous. At all events, I did so in an address to the members of our New York State Bar Association.

"The Supreme Court of the United States in the case of Frick v. Pennsylvania, 268 U. S. 478, sustained my contention.

"In Blodgett v. Silberman, 277 U. S. 1, in construing Blackstone v. Miller, 188 U. S. 189, it was claimed by some of the refined casuists, of various State taxing authorities, that the Supreme Court had retreated from this attitude in the Frick case.

"I was unable to concur in that view. Diverse opinion, however, is made negligible by the masterly opinion of Justice McReynolds, who on Jan. 6 delivered the opinion of the Court in the notable case of the Farmers' Loan and Trust Company, as sole surviving executor of the last will and testament of Henry R. Taylor, deceased, appellant, v. the State of Minnesota, defendant. In that case, with admirable courage, force and clarity, that distinguished judge brushed aside the ingenious and involved sophistries of the advocates of extraterritorial taxation, pointedly saying that to sustain that doctrine and practice would be 'to disturb good relations among the States and produce the kind of discontent expected to subside after the establishment of the Union, and that the Court is compelled to hold it untenable, and, to pre-

vent misunderstanding, it is definitely overruled.' Justice Stone, in a separate opinion, concurred.

"This decision effectually and finally terminates a practice that is abhorent to any student of the common law of our constitutional system, a system which treats the several States as a Union, not as a mere confederation of distinct and separate sovereignties, and reaffirms the ancient and for centuries undisputed doctrine of the common law, *mobilia sequuntur personam* (things movable go with the person).

* * * * * * * * *

"*Pari ratione* those of us who closely follow the decisions of the Supreme Court of the United States and of the Court of Appeals of this State constantly are impressed not only with conclusion predicated upon universally acknowledged fundamental principles of justice but by an entire absence of technical construction. Every problem courageously is confronted, justly and finally dealt with; there being none of that evasion of responsibility or vacillation not infrequently resorted to by lesser judicatories. Both Courts justly are entitled to that stately appellation of the ancients—august tribunals of justice."

It is now definitely settled that the power to impose a death tax on real property and tangible personal property is lodged with the state of actual situs and that no other state has the right to impose a death tax with respect thereto.

Keeney v. New York, 222 U. S. 525;
Matter of Swift, 137 N. Y. 77;
Frick v. Pennsylvania, 268 U. S. 473.

It is also the established doctrine of this Court that the maxim *mobilia sequuntur personam* is applicable to death taxation of intangible personal property and that the situs of such property owned by a decedent at the time of his death is at his domicile.

Blodgett v. Silberman, 277 U. S. 1, *supra*.

The intangibles owned by the decedent in the case just cited and which were held to have their situs at his domicile included:

(a) Shares of stock in corporations foreign to his domicile, and

(b) Intangibles which had a business situs in a foreign state.

The decedent was a resident of Connecticut. He had an interest as general partner, valued at $1,687,245.34, in the partnership of William Openhym & Sons, doing business in New York and organized under the Limited Partnership Act of New York. He also owned certificates of stock in New York, New Jersey and Canadian corporations appraised at $277,864.25. If it is to be decided that but one death tax may be levied, it is necessary that the power to levy this tax be granted to the state of the domicile of the decedent with respect to all of the intangible personal property involved in the foregoing case, unless this Court is prepared to overthrow its doctrine.

It is urged that it is inconsistent with due process under the Fourteenth Amendment to the Constitution of the United States for death taxes to be imposed at any other place than that where the transfer of the property takes place and that although for special purposes intangible property may have a situs at more than one place the jurisdiction of the situs at which the transfer at death takes place is the only one which has the power to tax. Such transfer, in the case of intangible personalty is made at the owner's domicile. The rule as to situs of transfer would apply alike to real and personal property, tangible and intangible property. It would be simple and equitable and would put an end to many of the perplexing problems

which have made the administration of estates a difficult and complicated matter from the standpoint of death taxes.

If this Court lays down such a rule, it is possible that it will be necessary for it to overthrow some of the *dicta* in the old cases and perhaps to distinguish or discard some earlier holdings. It would seem, however, that such a course is fully warranted at this time when the law of death taxation is being resettled. The major operation was performed when *Blackstone v. Miller* was overruled. Such minor additional excisions as may be found necessary ought not to be viewed with alarm. The doctrine of *stare decisis* should not stand in the way. It is well settled that this doctrine does not apply where a constitutional question is involved. At all times the law must be found in the Constitution itself and the provisions of the Constitution will govern regardless of any construction of it by the Courts. It is evident that the true principles which underlie death taxation have not been clearly understood and applied. Sight seems to have been lost of the fact that death taxes are taxes upon the transfer of the property at the death of the owner and are not subject to all of the rules which apply to other kinds of taxation.

It is unnecessary for the purposes of this brief to argue the question of whether there should be a departure from the principles laid down in some of the earlier cases which justify the state of domicile of a corporation in fixing the situs of its shares within such state so as to permit the imposing of general property taxes. Much might be said in favor of a single situs for general property tax as well as for death tax purposes. That there is a distinction between the two kinds of taxes sufficient to justify a limitation of the power of death taxation to the

state of domicile of the owner of the shares cannot be doubted. This distinction was recognized by this Court as far back as 1874 in *The Delaware Railroad Tax Case*, 18 Wall. 206, when Mr. Justice Field said (pp. 229-230):

> "In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts. Regarded in that aspect it is an interest or right which accompanies the person of the owner, having no locality independent of his domicile."

This Court in *Blodgett v. Silberman, supra*, recognized the situs of corporate shares as being at the domicile of the owner for death tax purposes and it seems impossible that a backward step should now be taken in that respect. Unless multiple taxation of corporate shares is to be permitted, the domicile of the corporation must be denied the power to tax.

The Maine Court in its opinion in this case rests the power of the State of Maine to impose the tax upon the proposition that under Maine law the transfer of the shares of stock cannot be completed until the fact of the transfer is recorded on the books of the corporation in the State of Maine. This is a very slender thread, particularly after the disapproval of the doctrine of *Blackstone v. Miller*. The fact is that Maine has no control whatsoever over the transfer of the shares and their devolution upon the death of the owner, and no power to prevent the transfer is asserted, except as an adjunct to a taxing statute. The beneficiaries under Mr. Haskell's will would take good title to

the shares by a transfer from his executor in the State of Massachusetts, and the only right which the State of Maine reserved is in the nature of a protection to the corporation issuing the shares in paying dividends thereon to the record owner in case the transfer is not recorded on the books of the corporation. The transferee would still be the one entitled to the dividends and, after their payment to the executor, as the legal representative of the owner of record, would have a right of action against such executor to recover the same. Therefore, every beneficial interest in the shares would pass to the transferee without regard to the laws of Maine. Surely, it cannot be said that the mere fact that Maine enacted that the corporation should be protected in the payment of dividends to the record holder of shares gives that state any power to impose a death tax upon the transfer thereof.

The Maine statute (R. S. 1916, Chapter 51, Secs. 36-37 [Sec. 36 amended by Chapter 49, P. L. 1919]—Record p. 19) is similar to Section 1 of the Uniform Stock Transfer Act. The Commissioners on Uniform State Laws have interpreted said Section 1 as follows (6 U. L. A. 2):

> "The provisions of this section are in accordance with the existing law (see Cook on Corporations, Section 373 *et seq.*), except that the transfer of the certificate is here made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of the corporation becomes thus like the record of a deed of real estate under a registry system."

The interpretation of the Commissioners on Uniform Laws would appear to be applicable to the Maine law and the registry of the transfer of stock would seem to be of no more importance than the recording of a deed.

The point that recording on the corporate books is not essential to the validity of the transfer is stated clearly in the opinion in *Auditor General v. Bassett's Estate*, 246 Mich. 440, where it was said (pp. 451-452):

> "Shares of stock in a corporation constitute a species of incorporeal property. Stock certificates are not stock. They are merely evidence of the existence and ownership of stock. *Lipscomb's Adm'r. v. Condon*, 56 W. Va. 416. The ordinary method of transfer is by indorsement and delivery of the certificate with power of attorney to make transfer on the books of the corporation. *Lebrecht v. Nellist*, 184 Mo. App. 335. This is usually followed by actual transfer on the corporate books and issue of new certificate in the name of the transferee. The ordinary method, however, is not exclusive. Thus, unissued stock may be sold without obtaining a certificate, *Ford v. Howgate*, 106 Me. 517; stock may be sold without delivery of certificate or power of attorney to transfer it on the corporate books, *Lipscomb's Adm'r. v. Condon, supra;* it may be assigned by separate instrument, *Brown v. Hotel Association of Omaha*, 63 Neb. 181; it may be transferred by bill of sale or any sufficient mode for passing title to a chose, *Young v. New Pedrara Onyx Co.*, 48 Cal. App. 1; it is not necessary that the certificate be physically delivered or indorsed or transferred on the books, *Grissom v. Sternberger*, 10 Fed. (2d) 765; even a statutory method of transfer is cumulative, not exclusive, 5 C. J. p. 898; the equitable title may be transferred by mere delivery of the certificate and without written assignment, 2 L. R. A. (N. S.) 804, note."

The essential difference between death and other forms of taxation is brought out by considering the taxation of

bonds of the United States. No state may levy a general property tax upon United States bonds, for to do so would hamper the operation of the Federal Government, but the state of domicile of the owner of such bonds may impose a death tax upon their transfer (see *Plummer v. Coler*, 178 U. S. 115). The latter tax is upon the transfer of property and not upon the property itself. This difference justifies the rule contended for that taxation of the transfer is restricted to the state where the property is and where the transfer takes place, that is, the domicile of the decedent, and this is true of intangibles of every kind.

POINT II.

A tax imposed by the state of domicile of a corporation only upon transfers of shares of stock of such corporation effected by the death of the owner would be based upon an arbitrary, unreasonable and capricious classification within the condemnation of the Fourteenth Amendment to the Constitution of the United States.

The State of Maine bases its right to impose a death tax upon the transfer of the shares of the Great Northern Paper Company owned by the decedent at the time of his death and transferred upon the happening of that event upon the fact that said corporation is incorporated under the laws of that state and because of its claim that under those laws the transfer is not completed until it is recorded on the books of the corporation. Maine does not pretend to have any right to control the succession to the shares, which is entirely governed by the laws of Massachusetts, the state of domicile of the owner. Maine's tax is, therefore, purely a tax upon the transfer of the shares, as distinguished from a succession or inheritance tax. If it be

conceded that the state of domicile of the corporation has the power to impose a tax upon the transfer of its shares, such right would be limited to the imposition of a tax upon all transfers, whether made by a natural person or a corporation and whether made *inter vivos* or by reason of death of the owner. The essential basis for the imposition of a tax upon a transfer effected by death is the power of control over the succession to the property, which justifies the classification of such transfers differently from all other transfers. Where control of the succession is absent, the basis for taxing the transfer at death disappears and such a transfer may not be classified differently from any other transfer. For the State of Maine, or any other state, to tax all transfers of shares of stock in domestic corporations would be one thing; for it to single out transfers taking effect upon the death of the owner of shares and subject such transfers alone to a tax is entirely different. It is purely arbitrary, unreasonable and capricious to tax transfers effected by death and not to tax other kinds of transfers when the power to tax is founded upon a general power to tax transfers and is not a particular power to tax transfers at death derived from control over succession. The statute of Maine under which the tax was assessed is one which taxes transfers occasioned by death and, although the power of classification for taxation is extremely broad and submits to but few restrictions, nevertheless it is quite unreasonable to include under such a statute the taxation of transfers of stock taking place upon death when no tax is asserted with respect to other transfers of stock and the succession does not take place under the laws of Maine.

So far as concerns the power to impose a death tax on the transfer of the shares, Maine is in much the same sit-

uation as was Pennsylvania in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*. Mr. Frick owned tangible personal property situated in the State of New York at the time of his death. Pennsylvania claimed the right to tax it because Mr. Frick was domiciled in that state, basing its claim on the allegation that the property passed under its laws. This Court decided otherwise, holding that the property passed under the laws of the State of New York and pointing out that even though New York did permit the Pennsylvania laws to govern the succession, it was not because the Pennsylvania laws had any virtue in New York but because New York had seen fit to adopt them and make them its own. Maine had no more control over the succession to the shares of stock than Pennsylvania had over the succession to the tangible personal property situated in New York. Maine's right to tax the transfer of the shares, if it had any such right, was founded upon a general power to tax the transfer of all shares issued by its domestic corporations, and it had no right to discriminate against shares transferred by virtue of the death of the owner in favor of shares transferred in other ways. White horses and black horses cannot be separately classified for taxation. If horses of one color are taxed, horses of other colors must also be taxed in the same manner. Race horses and work horses may be separately classified and subjected to tax burdens which differ. The difference between the transfer of the shares at death and the transfer of shares in some other way, so far as Maine is concerned, is no greater than the difference which exists between a black horse and a horse of another color. The transfer of the shares at death cannot be made a race horse and other transfers of shares work horses.

The principles of classification invoked under this point are too familiar to require detailed statement and examination. We are content to cite a few of the leading cases.

Home Insurance Co. v. New York, 134 U. S. 594;
Southwestern Oil Co. v. Texas, 217 U. S. 114;
Keeney v. New York, 222 U. S. 525, *supra;*
Citizens' Telephone Co. v. Fuller, 229 U. S. 322;
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304;
Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132;
F. S. Royster Guano Co. v. Virginia, 253 U. S. 412;
Watson v. Comptroller, 254 U. S. 122;
Heisler v. Thomas Colliery Co., 260 U. S. 245;
Stebbins v. Riley, 268 U. S. 137;
Schlesinger v. Wisconsin, 270 U. S. 230.

All of which is respectfully submitted.

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WILLIAM DALE O'BRIEN,
With him on the brief.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,

Appellant,

against

STATE OF MAINE.

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

MOTION AND BRIEF OF RUSSELL L. BRADFORD, AS AMICUS CURIAE, AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY.

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PRINTED IN THE UNITED STATES BY BENJ. H. TYRREL, INC., 110 GREENWICH ST., NEW YORK.

TABLE OF CONTENTS.

	PAGE
Motion for leave to file brief	a
Reference to facts	1
Brief statement of facts in case represented by *amicus curiae*	2
The Issue	2
POINT I:	
Corporate stocks should stand upon the same footing as other intangible personalty, and certainly should not be the only form of property to bear the burden of double or multiple taxation	3
Articles in Law Reviews—Appendix	

Table of Cases.

	PAGE
Baker *v.* Baker, Eccles & Co., 242 U. S. 394	5
Baldwin *v.* Missouri, 281 U. S. 586	4, 5, 13
Beidler *v.* South Carolina Tax Com. 282 U. S. 1	4, 5
Blodgett *v.* Silberman, 277 U. S. 1	4, 6
Brooke *v.* City of Norfolk, 277 U. S. 27	4, 5
Corry *v.* Baltimore, 196 U. S. 466	9, 10, 11
Daniel Reeves, Inc. *v.* Anderson, 43 Fed. (2) 679	12
Delaware Railroad Tax Case, 85 U. S. 229	13
Eisner *v.* Macomber, 252 U. S. 189	13
Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204	4, 5, 6, 7, 11, 12, 14
Fidelity etc. Co. *v.* Louisville, 245 U. S. 54	4, 5
Frick *v.* Pennsylvania, 268 U. S. 473	3, 9, 13
Kirtland *v.* Hotchkiss, 100 U. S. 491	4, 5
Rhode Island Hospital Trust Co. *v.* Doughton, 270 U. S. 69	4, 9, 10, 13
Safe Deposit & Trust Co. of Baltimore *v.* Virginia, 280 U. S. 83	4, 5
State Tax on Foreign-Held Bonds, 15 Wall 300	11
Susquehanna Power Co. *v.* State Tax Com. of Md., 283 U. S. 297	9, 10, 11
Tappan *v.* Merchants' Nat'l. Bank, 19 Wall. 490	10
Union Refrigerator Co. *v.* Kentucky, 199 U. S. 194	3, 12

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No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,

Appellant,

against

STATE OF MAINE,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for City Bank Farmers Trust Company, as Executor, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

RUSSELL L. BRADFORD,
Counsel for CITY BANK FARMERS TRUST COMPANY, As Executor,
Amicus Curiae.

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 171.

FIRST NATIONAL BANK OF BOSTON, Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,
against
STATE OF MAINE,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF OF AMICUS CURIAE.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *amicus curiae,* and on behalf of the City Bank Farmers Trust Company of New York as Executor of the Last Will and Testament of Virgil P. Kline, Deceased, and also on its behalf as executor of other estates, wherein the question here presented is involved.

Facts.

The facts in the case in suit are set out in the transcript of record, and in the opinion of the Supreme Judicial Court of Maine (R. 11), as well as in the brief of the appellant.

A Brief Resume of the Facts in Respect of One of the Cases Represented by the Undersigned.

Virgil P. Kline died a resident of the State of Oklahoma, leaving a Last Will and Testament wherein he named and nominated the City Bank Farmers Trust Company as Executor thereof. The greater portion of the estate of said Virgil P. Kline consisted of stocks of corporations organized under the laws of the State of Ohio, the certificates of stocks of which said corporations, however, were physically located in the City of New York. In due course the Oklahoma inheritance tax was paid upon all the intangible personalty owned by the decedent including shares of Ohio corporations. The State of Ohio also demanded an inheritance tax upon the value of the shares of the Ohio corporations.

An appeal from the tax determined by the State of Ohio in this respect was taken to the courts of Ohio and the issue here presented is now pending in the Supreme Court of Ohio, the lower courts having upheld as legal and constitutional the tax sought to be collected by the State of Ohio.

The Issue.

The issue presented in the case in suit while a very narrow one is nevertheless a very important one. It presents the question of whether property may be subjected to two or more taxes by the several states, and more particularly presents the question whether shares of corporate stocks (common or preferred) are so different in their characteristics from other intangibles as to render them subject to a different rule of law.

The argument of this brief in support of the appellant's contention that the State of Maine may not under the Fourteenth Amendment appropriately impose a

transfer inheritance tax upon stocks of a Maine corporation owned by a nonresident decedent and transferred at death pursuant to the laws of another State, will be addressed to the following:

POINT I.

Corporate stocks should stand upon the same footing as other intangible personalty, and certainly should not be the only form of property to bear the burden of double or multiple taxation.

The question of the taxation of property has not been always free from perplexity and, at times, confusion. This has been true in respect of direct or property taxes, as well as in respect of excises or indirect taxes. The legality of taxation revolves around the issue of situs of the property sought to be taxed, and around a consideration of power. Situs has its antecedent in the concept location. The question of power to tax is inherent in the question of situs. Tax laws in respect of real property have always been settled. Real property bears a tax only to the jurisdiction wherein it is located. It may be taken as fundamentally true that the question of the power to tax real property depends upon the fact of situs or location, and therefore the power does not exist as to real property located outside the taxing jurisdiction. This is true in respect of all kinds of taxes.

The law in respect of the taxation of tangible personalty for property taxes has now been definitely settled (*Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194) as it has been for the purpose of death duties (*Frick* v. *Pennsylvania*, 268 U. S. 473). We think the authorities are

clear to the effect that if there be no situs within the taxing jurisdiction, there is no power to tax.

The rule as to intangibles, certainly so far as notes, bonds, cash, choses in action, etc. are concerned, we think, is now definitely settled (*Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *Blodgett* v. *Silberman,* 277 U. S. 1; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, in respect of death duties and inheritance taxes; and *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Fidelity, etc. Co.* v. *Louisville,* 245 U. S. 54; *Brooke* v. *City of Norfolk,* 277 U. S. 27, and *Safe Deposit & Trust Co. of Baltimore* v. *Virginia,* 280 U. S. 83, in respect of property taxes). But this issue thus settled by the decisions is not based upon the actuality of situs, but upon the invocation of the ancient maxim of *mobilia sequuntur personam.*

The application of the maxim (whether a rule of law or not) may be considered as necessary to convenience, and this is so basically because intangibles technically cannot be said to have a location or situs (See *Farmers' Loan & Trust Company* v. *Minnesota, supra,* p. 211). In this aspect a situs must be attributed to such intangibles for purposes of taxation as well as for the purpose of determining property rights. Without such attribution there would be confusion in respect of property rights and devolution as well as taxes. The same property or asset might be taxable in at least four different localities (See *Farmers Loan and Trust Co.* v. *Minnesota, supra,* at pp. 209-210). The rate of tax, quadrupled, could be sufficiently high to absorb the property. Combined, the taxes could, indeed, exceed the value of the thing taxed. Which jurisdiction then should have priority?

This Court has decided that intangibles have a situs for tax purposes (as they have for devolution) at the domicile of the owner (*Blodgett* v. *Silberman, supra.* But

cf. *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394 (1917)). Certainly, for tax purposes, if the intangibles have not acquired a "situs for taxation other than at the domicile of their owner" when "they have become integral parts of some local business" (*Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 8 (1930)) intangibles, for *ad valorem* personal property taxes, may be subject to tax only at the domicile of the owner (*Kirtland* v. *Hotchkiss, supra; Fidelity, etc. Co.* v. *Louisville, supra*); and this is true also in respect of a trustee-owner (*Brooke* v. *City of Norfolk*, 277 U. S. 27 (1928); *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83 (1929)); and similarly for inheritance taxes or death duties (*Farmers' Loan & Trust Company* v. *Minnesota, supra; Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Commission, supra*).

The question of the effect of a separate business situs of intangibles upon the problem of multiple taxation was reserved in *Farmers' Loan & Trust Co.* v. *Minnesota*. In *Beidler* v. *South Carolina Tax Commission, supra*, Mr. Chief Justice Hughes at p. 8 said:

> "In *Farmers Loan & Trust Company* v. *Minnesota, supra*, this Court reserved the question of business situs, saying: '*New Orleans* v. *Stempel*, 175 U. S. 309, *Bristol* v. *Washington County*, 177 U. S. 133, *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile'."

For *ad valorem* personal property taxes it therefore may be said that if the intangibles have acquired a business situs separate from the domicile of the owner, it is a reserved question whether such intangibles could be

taxed again "at the owner's domicile". But in respect of death duties (excises) such intangibles may be taxed at the domicile of the owner upon the transfer thereof by death. (See *Blodgett* v. *Silberman, supra,* at pp. 10-11).

In *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* at p. 211, the Court said:—

> "While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. *And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction.*" (Italics ours.)

We therefore may take it as settled that the power of the taxing authority to tax property is limited to the taxation of property within its jurisdiction; and that to tax an event or excisable occasion the taxing authority must have control or jurisdiction over the event or act. This is true without variation in respect of real property and tangible personalty. It is true in respect of intangibles, such as notes, bonds, cash, choses in action, etc., as we have seen above. The basic thought underlying this principle likewise should have its application to stocks. That stocks are "intangibles" is obvious. (See *Blodgett* v. *Silberman,* supra, at p. 17).

There is no sound distinction to be drawn between bonds, notes, other choses in action, and stocks. True, the issue of whether stocks may bear a multiple tax by different taxing authorities assessing a tax "on different

and inconsistent principles'' has not the definite crystallization of court decisions that bonds, notes and other choses in action have. Nevertheless stocks are as much a part of the wealth of the country as are bonds or debts. The same underlying factors of present day business conditions apply equally to this class of intangibles as they do to other classes of intangibles.

As Mr. Justice McReynolds said:—

> ''Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment.'' (*Farmers Loan & Trust Company* v. *Minnesota,* supra, at pp. 211-212).

As much of the wealth of this country is invested in stocks of corporate business, commercial and industrial concerns as is invested in bonds, notes or debts. Corporate enterprise in financing and re-financing sometimes do so by the issue of preferred stock (whether redeemable or not) and at other times by the issuance of bonds. It frequently is a matter of indifference which method is used,—a matter of indifference to the corporation as well as to the purchaser of the stock or the bonds. So far as the contributor to the corporation (that is the purchaser) is concerned, his wealth and the value of his asset is the same whether it be reflected in a paper instrument called ''preferred stock'' or a paper instrument called a ''bond''.

But if the characteristics of stock as an intangible are so different from those of bonds as intangibles, then corporate re-financing by the use of stocks would subject the holders thereof to a possible double or multiple tax as contradistinguished from the situation that would obtain if there were an issue of bonds. Are the characteris-

tics so definitely different? We suggest that the difference between the power of the State in granting the corporate franchise to control the situs of stock and the power of the State granting the corporate franchise to control the situs of the bonds issued by that corporation is too shadowy to predicate thereupon a separate distinct rule of taxation rendering the one subject to double or multiple taxation and the other to a single tax.

Modern times and economic conditions are repellant to such a separation for the purposes of taxation.

Much of the wealth of this country, certainly much of the business, commercial and industrial pursuits of this country, are conducted through corporate organization. The capital employed by the corporation, whether acquired by sale of preferred or common shares of the corporation or by sale of bonds or notes of the corporation come from all quarters of the nation,—indeed, from all the world.

The trend of the times is against drawing distinctions between forms of "intangibles" as much so as drawing distinctions between forms of "tangibles".

If the principle that intangible property in the present day and in the light of present economic conditions, and the worldwide interrelation of business and commerce, should have the same protection from double taxation that tangible property has, then it follows necessarily that this principle, to have any practical force and benefit, should comprehend all intangibles and not just some species of intangibles. The practical beneficial effect of the principle would be nullified if one particular species of intangibles (a species in which much of the wealth of the nation is invested) was left outside open to attack by the tax laws of several of the States.

While there is dicta, the implication from which suggests that stocks may be taxable at the domicile of the corporation and, indeed, by two or more taxing jurisdic-

tions (*Frick* v. *Pennsylvania*, supra, at p. 497, and *Rhode Island Hospital Trust Co.* v. *Doughton*, supra, at p. 81), there is a definite decision (see *Rhode Island Hospital Trust Co.* v. *Doughton* case) that a state wherein the corporation has its property, if it be neither the state of incorporation nor the state of domicile of the owner of the property, may not impose an excise upon the transfer of the stock upon the death of the owner. Yet practically and broadly (sheer technicalities aside) that state in all probability should have even a greater right to impose a tax than the state of incorporation.

The state of incorporation has a full right to impose such taxes as it thinks appropriate upon the corporation. Any *quid pro quo* due the state for the services of the state and protection rendered by the state of incorporation should be, and in most cases is, exacted by that state from the corporation. The state may even go so far as to impose an *ad valorem* personal property tax upon the stock of that corporation even though owned by nonresidents, if the tax so imposed is in lieu of all other taxes upon the corporation. (Cf. *Susquehanna Power Co.* v. *State Tax Commission of Maryland*, 283 U. S. 297). This would be so in the case of a tax upon stocks of a corporation (whether owned by residents or nonresidents) in lieu of taxes upon the corporation itself; in other words, a franchise tax or a tax in effect upon the property of the corporation, but in form one upon the stock. (*Susquehanna Power Co.* v. *State Tax Commission*, supra, at p. 299). *Corry* v. *Baltimore*, 196 U. S. 466, we think should be read in the light of the *Susquehanna Power Co.* v. *State Tax Commission of Maryland* decision.

But reason stops with the control of the state over the corporation. True, the state of incorporation may define the rights of the shares in such corporation, but similarly the state of incorporation may define the rights

inhering in bonds issued within, but sold without, the jurisdiction of that state.

If we accept the principle that the taxation of intangibles is confined to a single taxing authority, as we must of tangibles and immovables, it follows that the only question to be answered with respect to stocks is what taxing authority shall be deemed to have jurisdiction. The state wherein the corporation owns its property or conducts its business as contradistinguished from the state of incorporation, is eliminated by virtue of the decision in *Rhode Island Hospital Trust Co.* v. *Doughton,* supra.

The taxes involved in the *Corry* case and in the *Susquehanna Power Co.* case were property taxes, and had to do with the jurisdiction of the state over the corporation, and through the corporation over the stock thereof. Even so, stock may be transferred without the state. As between transferror and transferee, the transfer is valid and complete without the intercession or use of the functions of any of the rules or laws of the state of incorporation. (The mere question of registration is "an immaterial circumstance"). It may be that for personal property taxes (direct taxes) the state of incorporation appropriately may subject the stock owned by a nonresident to tax. (See *Tappan* v. *Merchants' National Bank,* 19 Wall. 490—but consider the provisions of R. S. 5219 applying to the taxation of national banks or the stocks thereof).

We think in view of the quite obvious desirability of not burdening property or wealth with duplicate and multiple taxation that to permit corporate stock, even for property taxes, to be taxed at the state of incorporation would be regrettable. But the basis of jurisdiction for an *ad valorem* personal property tax or for a corporate franchise tax could have no pertinency to a tax upon "succession" or "transfer" of stock owned by a

nonresident of the taxing state and transferred under the laws of another state.

The citations of *Corry* v. *Baltimore,* supra, and *Susquehanna* v. *State Tax Commission of Maryland,* supra, are beside the point when consideration is given to the incidence of the tax in death duty cases. The "succession" or "transfer" in Massachusetts does not take effect in Maine, and is not governed by the laws of Maine. The excisable occasion is the "transfer," i. e., the "succession". Can two distinct laws govern? If the succession, which is the basis, the incidence, of the tax, does not occur in Maine, then Maine may not tax what is not in its jurisdiction. It is not stock that is being here taxed, but the "transfer" by succession. The transfer may be excised only by the state whose laws fasten upon the thing taxed, which is the "transfer" upon death.

In this day ownership of stock in a corporation or of bonds issued by a corporation are not confined merely to those domiciled within the state of incorporation. The ownership of stock and of bonds is scattered everywhere. Of course, in respect of bonds, this Court has held in *State Tax on Foreign-Held Bonds,* 15 Wall. 300, that the state having jurisdiction of the debtor could not impose an *ad valorem* personal property tax on the bond issued, but that the bond was cognizable for taxation only in the state of the creditor, that is the bondholder. This Court has now held similarly in respect of death duties (*The Farmers' Loan and Trust Company* v. *Minnesota,* supra).

The rules applying to this species of intangibles should apply with equal force to stocks. Both are intangibles, and both represent the asset or wealth of the owner. Public policy compels to this conclusion; the trend of the cases indicate it; and economic needs in the present day of world-wide business demand it.

Two Taxes by Two Different States Upon One Succession Violates the Fourteenth Amendment.

The Constitution of the United States must be construed in the light of present day conditions in the consideration of the application of the laws to it. It is not a fixed and inflexible rule, incapable of elasticity or of being susceptible of adaptation to changing conditions and the development in modern thought and science. As Judge Learned Hand said in *Daniel Reeves, Inc.* v. *Anderson,* 43 Fed. (2d) 679, at p. 682:—

> "Were the Fifth Amendment a remorseless pattern which all legislation must fit, the argument might even so be troublesome; might indeed be conclusive. But constitutional limitations are not indifferent to the occasions of the statutes they affect. They represent a mood rather than a command, that sense of moderation, of fair play, of mutual forbearance, without which states become the prey of faction. They are not the rules of a game; their meaning is lost when they are treated as though they were."

The development of modern business, new economic conditions, was one of the bases of the thought of this Court in *Union Refrigerator Transit Co.* v. *Kentucky,* supra, in holding that the fiction of situs of movables no longer had its application in respect of tangible personalty. Yet the doctrine had come down through many generations that all personal property followed the owner. As mechanical and scientific inventions brought peoples of one quarter of this country into immediate contact with peoples of other quarters, and business ceased to be transacted as a local enterprise but became nation, and even world, wide, this Court held (*The Farmers' Loan and Trust Company* v. *Minnesota*) that intangibles (certainly such as those involved in that case) deserved as much protection from duplicate and multiple taxation as tangible personalty.

In neither the *Frick* case nor the *Rhode Island Trust Co.* case was the question *directly* presented to the Court of the right of the state in which the corporation was organized to impose a transfer inheritance tax in respect of property transferred under and by the laws of another state. The subject of the tax here, as in those cases, was the "transfer" or the "succession". The "transfer" does not take effect in or because of the laws of Maine—but under the laws of Massachusetts. The *Rhode Island Trust Co.* case refused to admit identity of ownership by the corporation and the stockholder. (See also *Delaware Railroad Tax Case*, 85 U. S. [18 Wall. 206] at pp. 229-30; *Eisner* v. *Macomber*, 252 U. S. 189 at pp. 213-214). The shareholder has only rights in law as has a bond owner.

The one thing that controls or should control is what state *has jurisdiction over the transfer* by death of intangible property. The "transfer" or "succession" cannot occur under the laws of two states. Strictly and accurately speaking the taxable occasion is the "transfer". The tax must fasten upon that event, and that event must be within the jurisdiction of, that is controlled by, the state seeking to impose the tax. A tax imposed by any other state would be in violation of the "due process of law" clause of the Fourteenth Amendment.

The "due process of law" clause of the Fourteenth Amendment is not "given a much more extended and artificial signification" (dissenting opinion of Mr. Justice Holmes in *Baldwin* v. *Missouri*, at p. 598) in construing it to cover corporate stocks than could be considered it was given in covering state and municipal bonds. "Due process of law" has no precise (and therefore circumscribed) meaning. Its very generality is its strength and its important service in our constitutional system. The Constitution, drafted in an age of intense personalism and individualism, as applied to conditions and thought then existing, is yet sufficiently flexible and elastic to adapt itself to this day and time—to this complex

financial and mechanical age. It is a living thing, and its meaning and its force must look always to the present and the future.

We think the "due process of law" clause of the Fourteenth Amendment means that the power of a state to impose a tax shall be confined to that property, those persons, acts and businesses, within its borders and over which it has control. We think that a tax upon the "transfer" or "succession" may be imposed only by the state the laws of which govern the succession. An excise upon that event by any other state would be unconstitutional.

It would seem to us that the real issue is not whether there shall be two death duties imposed upon the transfer of corporate stocks, but should be whether the state of incorporation or the state of domicile shall impose the single constitutionally allowable tax.

Since the decision of this Court in *Farmers Loan & Trust Co.* v. *Minnesota* and the cases decided in consequence thereof, the law reviews have frequently discussed the effect and purport of these decisions. A partial list of the many references in the legal periodicals having to do with the taxability, for death duty purposes of corporate stocks, is set out for the convenience of the Court in an appendix to this brief.

POINT II.

The decision of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted,

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APPENDIX.

List of Articles in Law Reviews.

Extra-Territorial Transfer Taxes on Intangible Property of a Non-Resident Decedent, 30 Columbia Law Review 404, 405, March, 1930.

Inheritance Taxes—Taxation by State of Property Not Within its Jurisdiction, 64 U. S. Law Review, 158, 160-1, March, 1930.

Jurisdiction to Tax Intangibles, 43 Harvard Law Review, 792, 797, March, 1930.

Constitutional Law—Taxation of Intangible Property, R. D. Ray, 15 Cornell Law Quarterly, 457, 464, April, 1930.

Inheritance Taxes on Shares of Non-residents at Corporate Domicile, Harry Rockwell, 8 N. C. Law Review 318, 321-3, April, 1930.

The Taxable Situs of Intangibles, J. M. Wisdom, 4 Tulane Law Review 469, 475-6, April, 1930.

Taxation, Power of Obligor State to Tax Inheritance, 28 Mich. Law Review 916, 917, April, 1930.

Application of Ohio Inheritance Tax to Intangibles of Non-resident Decedents, T. G. Gutting, 4 University Cincinnati Law Review, 398, 405-6, May, 1930.

Constitutional Law, Jurisdiction to Tax, 18 Georgetown Law Journal 364, 372-3, May, 1930.

The 14th Amendment in its Relation to State Taxation of Intangibles, 18 Cal. Law Review 345, 357-8, May, 1930.

Taxation, Constitutional Law, Situs of Bonds, 5 Washington Law Review 132, June, 1930.

Taxation, Jurisdiction to Tax Intangibles, 3 So. Cal. Law Review 428, 435, June, 1930.

Jurisdiction to Tax Intangibles, Multiple Taxation Being Avoided, Morris Anapolsky, 10 Boston University Law Review, 423, 427-9, June, 1930.

Double Taxation and State Inheritance Taxes, Lyle W. Ohlander, 8 Nat'l Income Tax Magazine 253, July, 1930.

Death Taxes, Recent Statutory and Judicial Solutions of Multiple Taxation, L. Brady, 16 American Bar Association Journal 532, 533, August, 1930.

Power of the States to Tax Intangibles or their Transfer, J. C. Peppin, 18 Cal. Law Review 638, 661-71, September, 1930.

Taxation, Jurisdiction to Tax Intangibles, 29 Mich. Law Review, 93, 97-8, November, 1930.

Double Inheritance Taxation of Intangibles, 40 Yale Law Journal, 99, 104-5, November, 1930.

Tendencies in the Taxation of Intangibles, Chas. Lowndes 17 Va. Law Review 146, 159, December, 1930.

Inheritance Taxation, Jurisdiction to Tax Intangibles, 15 Minn. Law Review 254, January, 1931.

Ohio Inheritance Tax in Relation to Bank Deposits and Stock Ownership of Non-resident Decedents, T. G. Gutting, 5 University of Cincinnati Law Review 245, 246, March, 1931.

Recent Developments in the Law of Inheritance Taxation, Lyle W. Ohlander, 9 Tax Magazine 283-4, August, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1931.

First National Bank of Boston, Executor of the Estate of Edward H. Haskell, Deceased, Appellant, *vs.* State of Maine. | Appeal from the Supreme Judicial Court of the State of Maine.

[January 4, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

The question presented for our determination by this appeal is whether the State of Maine has power, under the Fourteenth Amendment, to impose a tax upon a transfer by death of shares of stock in a Maine corporation, forming part of the estate of a decedent, who, at the time of his death, was domiciled in the Commonwealth of Massachusetts.

The facts which give rise to the question follow. In 1924, Edward H. Haskell died testate, a resident of Massachusetts. The greater part of his property consisted of shares of stock in the Great Northern Paper Company, a Maine corporation, having most of its property in that state. His will was probated in Massachusetts, where the stock, as a part of his estate, had been made liable to an inheritance tax of like character to the inheritance tax in force in Maine. The Massachusetts tax amounted to over $32,000 and was paid on legacies and distributive shares made up in greater part of the proceeds of the paper company stock. Ancillary administration was taken out in a Maine probate court, and an inheritance tax, amounting to over $62,000 was assessed under the Maine statutes* on the property passing by the will. Upon this amount the tax paid to Massachusetts was allowed as a credit, and an action of debt was brought to recover

*Sec. 1, chap. 69, R. S. Maine, 1916, provides:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state,

the balance. Upon an agreed statement embodying the foregoing facts, the case was referred for final decision to the Supreme Judicial Court of the State of Maine, sitting as a law court. That court rendered judgment for the state, holding that the shares of stock were "within its jurisdiction and there subject to an inheritance tax even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state"; and that the Fourteenth Amendment thereby was not infringed. 130 Me. 123.

Beginning with *Blackstone* v. *Miller,* 188 U. S. 189, decisions of this court rendered before *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, it may be conceded, would preclude a successful challenge to the judgment of the state court. In the first named case it was held that a deposit in a New York trust company to the credit of Blackstone, who died domiciled in Illinois, was subject to a transfer tax imposed by New York, notwithstanding the fact that the whole succession, including the deposit, had been similarly taxed in Illinois. That decision was overruled by the *Farmers Loan Company* case, and with it, of course, all intermediate decisions so far as they were based on *Blackstone* v. *Miller.*

A review of these decisions would serve no useful purpose. While in some of them a restatement of the doctrine of *Blackstone* v. *Miller* was unnecessary to a determination of the points presented for consideration, and in others the facts might be distinguished from those of the present case; nevertheless, the authority of the *Blackstone* case was accepted by all. *Frick* v. *Pennsylvania,* 268 U. S. 473, was one of the latest to approve that case and give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death

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. . . shall be subject to an inheritance tax for the use of the state as hereinafter provided. . . ."

Sec. 25 of the same chapter in substance provides that in case of transfers of stock owned by a nonresident decedent in a Maine corporation, the tax shall be paid to the Attorney General at the time of the transfer.

Sec. 37, chap. 51, R. S. Maine, 1916, provides:

"No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest.

It was by the *Frick* case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the state where the property has an actual *situs;* and this, as will be seen later, has an important bearing on the present case. Mr. Frick, domiciled in Pennsylvania, died testate owning tangible personal property having an actual *situs* in New York and Massachusetts. His will was probated in Pennsylvania, and a transfer tax was imposed under a Pennsylvania statute which provided for such a tax on all property of a resident decedent, whether within or without the state. Ancillary letters were granted in New York and Massachusetts. We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was imposed upon the transfer of tangible personalty, having an actual *situs* in other states, was in contravention of the due process clause of the Fourteenth Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extraterritorial operation; and (3) that as respects tangible personal property, having an actual *situs* in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the owner's domicile.

The tax there under consideration was not a property tax, but one laid on the transfer of property on the death of the owner, and as to that the court said (p. 492):

"But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

See also *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 80.

The decision of this court in the *Farmers Loan Company* case was foreshadowed by its decision in *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83. There it was held that intangibles, such as stocks and bonds, in the hands of the legal holder of the title in

the state of his residence, may not be taxed at the domicile of the equitable owner in another state; and in respect of taxation of the same securities by two states we said (p. 94):

"It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

A little later at the same term, the *Farmers Loan Company* case was decided. 280 U. S. 204. The facts are recited at page 208. Henry R. Taylor, domiciled in New York, died testate leaving negotiable bonds and certificates of indebtedness issued by the State of Minnesota and two of her municipalities. Some of them were registered; none were connected with business carried on by or for the decedent in Minnesota. His will was probated and his estate administered in New York, and a tax exacted by that state on the testamentary transfer. Minnesota assessed an inheritance tax upon the same transfer, which was upheld by her supreme court. This court, applying the maxim *mobilia sequuntur personam,* held that the *situs* for taxation was in New York, and that the tax was there properly imposed. The contention on behalf of the state was that the obligations were debts of Minnesota and her municipal corporations, subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment; and that, accordingly, they had a *situs* for taxation also in that state.

This court agreed that *Blackstone* v. *Miller* and certain approving opinions lent support to the view that ordinarily choses in action might be subjected to taxation both at the domicile of the debtor and that of the creditor, and that two states might tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. But it was said that the tendency of that view was to disturb good relations among the states; that the practical effect of it had been bad; and that a preponderance of the states had endeavored to avoid the evil by resort to reciprocal exemption laws. Upon these and other considerations, which we shall not stop to particularize, the case was overruled as no longer constituting a correct exposition of existing law. The view that two states have power to tax the same transfer on different

and inconsistent principles was distinctly rejected; and the general reasons which support the rule that tangibles and their testamentary transfer may be taxed only by the state where they are found were held to be sufficient to inhibit the taxation by two states of intangibles with a taxable *situs* imposed by due application of the *mobilia* maxim.

After saying that choses in action, no less than tangible personalty, demand protection against multiple taxation, the court, at p. 212, concluded:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

Notwithstanding the registration of certain of the bonds, and notwithstanding the contention that Minnesota protects the debt, compels its payment, and permits its transfer, we concluded that the testamentary transfer was properly taxable in New York, but not also in Minnesota.

This case was followed by *Baldwin* v. *Missouri,* 281 U. S. 586. There the testator, domiciled in Illinois at the time of her death, had credits for cash deposited in banks located in Missouri, and certain bonds of the United States and promissory notes—all physically within that state. Some of the notes, executed by residents of Missouri, were secured on lands in that state. Applying the principles of the *Farmers Loan Company* case, we held that the *situs* of these credits, bonds and notes was at the domicile of the testator, and there passed from the dead to the living; that they were not within Missouri for taxation purposes; and that the transfer was not subject to the power of that state.

Beidler v. *So. Car. Tax Commission,* 282 U. S. 1, presented still another phase of the subject. There it appeared that a resident of Illinois died in that state. At the time of his death, a South Carolina corporation was indebted to him in a large sum upon an open, unsecured account entered upon the books of the corpora-

tion kept in South Carolina. Again applying the principles of the *Farmers Loan Company* case, we held that the transfer by death of this debt was taxable only by the state of the domicile.

It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states.

It is true, there are such differences between bonds and stocks as might justify their being placed in separate categories for some purposes. But, plainly, they may not be so placed for the purpose of subjecting a transfer by death of the former to a tax by one state only, and a similar transfer of the latter to a tax by two or more states. Both are intangibles and both generally have been recognized as resting in contract, or, technically, as "choses in action." *Hawley* v. *Malden*, 232 U. S. 1, 12; *Blodgett* v. *Silberman*, 277 U. S. 1, 14. The reciprocal inheritance statutes now in force in a preponderating number of the states of the Union make no distinction between the various classes of intangible personal property. The New York statute, for example, under that term includes "deposits in banks, mortgages, debts, receivables, *shares of stock*, bonds, notes, credits, evidences of an interest in property, evidences of debt and choses in action generally." Genl. L. N. Y., 1930, c. 710, § 1. This impressive recognition of the substantial identity of the enumerated intangibles, for purposes of death taxation, is entitled to weight.

A distinction between bonds and stocks for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect of the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing, for the most part, the same or like characteristics, may be subjected to contrary rules in that regard.

We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only.

The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple: the transfer, that is, the taxable event, occurs in that state where the property has an actual *situs*, and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual *situs*. But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam*. *Farmers Loan Co.* v. *Minnesota, supra,* at pp. 211-212; *Baldwin* v. *Missouri, supra*; *Beidler* v. *So. Car. Tax Commission, supra.*

This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded to the law of the place where the property is kept and used. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *Eidman* v. *Martinez,* 184 U. S. 578, 581; *Union Transit Co.* v. *Kentucky, supra,* 206. But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property. *Blodgett* v. *Silberman, supra,* 9-10; *Farmers Loan Co.* v. *Minnesota, supra,* 211; *Union Transit Co.* v. *Kentucky, supra,* 206.

The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the

case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. Ownership of shares by the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. *The Delaware Railroad Tax,* 18 Wall. 206, 229-230; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 81; *Eisner* v. *Macomber,* 252 U. S. 189, 213-214. And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile. The fact that the property of the corporation is situated in another state affords no ground for the imposition, by that state, of a death tax upon the transfer of the stock. *Rhode Island Trust Co.* v. *Doughton, supra.* And we are unable to find in the further fact of incorporation under the laws of such state, adequate reason for a different conclusion.

Undoubtedly, the state of incorporation may tax the transfer of the stock of a nonresident decedent, and the issue of a new certificate to take the place of the old, under the power generally to impose taxes of that character. But, plainly, such a tax is not a death duty which flows from the power to control the succession; it is a stock transfer tax which flows from the power of the state to control and condition the operations of the corporation which it creates. A formal transfer of the stock upon the books of the corporation, and the issue of new certificates, bear a relation to the succession differing little, if at all, in substantial effect from that borne by the registration of the state bonds, involved in the *Farmers Loan Company* case, or the necessity of invoking the law of Missouri in respect of notes secured on Missouri lands, involved in the *Baldwin* case. Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view.

We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. See *Farmers Loan Company* case, *supra,* at p. 213. That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration.

We hold that the exaction of the tax here assailed was not within the power of the state under the Fourteenth Amendment; and, accordingly, the judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1931.

First National Bank of Boston, Executor of the Estate of Edward H. Haskell, Deceased, Appellant, *vs.* State of Maine. | Appeal from the Supreme Judicial Court of the State of Maine.

[January 4, 1932.]

Mr. Justice Stone.

Recognizing that responsibility must rest primarily on those who undertake to blaze a new path in the law, to say how far it shall go, and notwithstanding the decisions of this Court in *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83; *Farmers Loan & Trust Company* v. *State of Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, I am not persuaded that either logic, expediency, or generalizations about the undesirability of double taxation justify our adding to the cases recently overruled, the long list of those which, without a dissenting voice, have supported taxation like the present. No decision of this Court requires that result. See *Baldwin* v. *Missouri*, *supra*, p. 596.

Such want of logic as there may be in taxing the transfer of stock of a non-resident at the home of the corporation results from ascribing a *situs* to the shareholder's intangible interests which, because of their very want of physical characteristics, can have no *situs*, and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have *situs* in one and not in the other. *Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.

The decedent, if we disregard the fiction and its attendant maxims, acquired rights and privileges with respect to a corporation created by Maine and under its control. The nature and extent of his interest are defined by the laws of Maine, and his power to secure the complete transfer of it is dependent upon them. These characteristics of corporate shares, distinguishing them in several respects from unsecured obligations to pay money, have long been explicitly recognized by this Court as the source of state power to tax non-resident stockholders and as sufficient ground for its exercise. See *Frick* v. *Pennsylvania,* 268 U. S. 473, 497; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 401; *Hawley* v. *Malden,* 232 U. S. 1, 12; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69, 81. See also *Corry* v. *Baltimore,* 196 U. S. 466. Compare *Citizens National Bank* v. *Durr,* 257 U. S. 99; *Cream of Wheat Company* v. *County of Grand Forks,* 253 U. S. 325. This Court has recently said, in *Frick* v. *Pennsylvania, supra*:

"The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those States the status of lienors in possession. As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid. . . . We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power."

The withdrawal from appellee of authority to impose the present tax, in terms which would sweep away all power to impose any form of tax with respect to the shares of a domestic corporation if owned by non-residents, would seem to be a far greater departure from sound and accepted principles, and one having far more serious consequences, than would the disregard of wholly artificial notions of the *situs* of intangibles.

The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware

of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words—saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere, is it possible to stigmatize the tax as arbitrary.

Affirmance of this judgment involves no declaration that the tax may be imposed by three or more states instead of two, and, under the decisions of this Court, there is no ground for supposing that it could be. See *Rhode Island Trust Company* v. *Doughton*, 270 U. S. 69. Even if it be assumed that some protection from multiple taxation, which the Constitution has failed to provide, is desirable, and that this Court is free to supply it, that result would seem more likely to be attained, without injustice to the states, by familiar types of reciprocal state legislation, than by stretching the due process clause to cover this case. See 28 Columbia L. Rev. 806; 43 Harvard L. Rev. 641. We can have no assurance that resort to the Fourteenth Amendment, as the ill adapted instrument of such a reform, will not create more difficulties and injustices than it will remove. See 30 Columbia L. Rev. 405-406.

The present denial to Maine of power to tax transfers of shares of a non-resident stockholder in its own corporation, in the face of the now accepted doctrine that a transfer of his chattels located there and equally under its control, *Frick* v. *Pennsylvania, supra*, and that his rights as *cestui que trust* in a trust of property within the state, *Safe Deposit & Trust Company* v. *Virginia, supra*, may be taxed there and not elsewhere, makes no such harmonious addition to a logical pattern of state taxing power as would warrant overturning an established system of taxation. The capital objection to it is that the due process clause is made the basis for withholding from a state the power to tax interests subject to its control and benefited by its laws; such control and benefit are together the ultimate and indubitable justification of all taxation.

I think the judgment should be affirmed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur in this opinion.